

New NLRB Poster Mandated for U.S. Private-Sector Employers Even If They Have No Union-Represented Employees

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The National Labor Relations Board (NLRB) recently announced a new rule that, starting November 14, 2011, virtually all private employers — whether or not they have any unionized employees — must post "notices informing their employees of their rights as employees" under the National Labor Relations Act (NLRA). A failure to post this notice is itself an unfair labor practice. This rule may lead to an increase in organizing activity. ([Click here](#) for a complete copy of the new regulation and its rulemaking preamble.) The rule was adopted by a 3-1 vote of the NLRB.

Here is some of the most critical information for employers about the new notice requirement:

The new regulation covers all employers under the NLRB's jurisdiction, even if none of their employees belong to a labor union. In the past, the NLRA has required workplace notice postings in one of two situations: (1) in advance of a scheduled union representation election; or (2) as a remedy for employer unfair labor practices. Both scenarios usually involve a union that represents or desires to represent employees. By contrast, the new regulation applies even where there is no employee interest in a union, so long as the employer is covered by the NLRA. (Most private-sector employers are covered by the NLRA, although there are diverse exceptions; for example, some religious institutions are exempt from the NLRA, and railroads and air carriers are covered by separate labor laws. Certain small businesses can be exempt from the NLRA depending on their annual volume of business.) For many private employers, this regulation marks the first time they will be required to take specific action to comply with the NLRA.

Official copies of the notice will be available on November 1, 2011. Although the regulation includes the text of the new notice, the NLRB has not yet published official posting versions of the notice. Those will be available for download at www.nlr.gov beginning November 1st.

Posting in multiple formats and languages is required. According to the rule: "In addition to posting the required notice physically, an employer must also post the required notice on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means." Employers whose workforces are more than 20% non-English-speaking are also subject to requirements to post translations of the notice as they become officially available in languages other than English.

The official approved notice is biased in favor of unions and may mislead employees. Under the NLRA, both employers and unions are required to comply with the law; failure to do so by either is an "unfair labor practice." The new poster lists 14 examples of employer unfair labor practices, but only five of union unfair labor practices. In addition, the poster gives employees slanted advice that is overbroad and incorrect. Most notably, it states that employees cannot be disciplined for "talking about or soliciting for a union during non-work time." The poster fails to note that certain employees (for example, hospital employees while working in patient care areas) may lawfully be prohibited from union solicitation. (Employers are not permitted by the rule to alter the poster, even to make it more accurate.)

Failure to post the notice may be considered an "unfair labor practice." The new rule specifically rejects a "voluntary compliance" approach. Instead, the NLRB has reserved the right to prosecute employers for the "unfair labor practice" of not posting the required notice by November 14th.

The new rule helps unions in pursuing unfair labor practice charges that would otherwise be dismissed. The new rule authorizes the NLRB to make an untimely unfair labor practice timely when the employer has failed to post the required notice. Therefore, even if an unfair labor practice charge alleges conduct outside of the six-month statute of limitations, a



union can now bring the charge if the employer has failed to post the notice. Moreover, failure to post the notice serves as evidence of unlawful motive in adjudicating unfair labor practice charges, even in the absence of any evidence of animus.

This is a wake-up call to non-unionized employers. The new poster may increase employee interest in unions. They may also lead employees to question workplace rules that conflict with information on the poster. It should in particular review rules regarding solicitation, distribution, after-hours access, and confidentiality, as those rules are regularly challenged by labor unions. Given the overbroad wording of the notice, healthcare employers will need to be prepared to explain their rules regarding solicitation in the solicitation.

Expect more gifts to organized labor from the Obama Administration. The Office of Federal Contract Compliance Programs already requires federal contractors and subcontractors to post a similar notice. The NLRB is fashioning new regulations that will expedite union representation elections and make it harder for employers to contest those elections. (Further action by the NLRB on those regulations is expected before the end of this year, at which point the NLRB will lose its required quorum due to an expired recess appointment.) And the Department of Labor is proposing new regulations that will require employers to publicly disclose certain fees paid to labor consultants when responding to union organizing campaigns. These rules, taken together, appear designed to placate organized labor, which was disappointed over its inability to pass the controversial "Employee Free Choice Act" in the last Congress.

We will periodically provide updates on new developments regarding this regulation, including the status of any legal challenges to the posting requirement.

Howard Rice attorneys regularly represent employers in disputes involving organized labor, including appearing at NLRB hearings, providing legal advice regarding responses to union representation campaigns, and handling union contract negotiations and arbitrations. For more information about our labor practice, [click here](#).

If you have questions about any of the issues raised in this alert, contact [Christopher Scanlan](#) at 415.677.6427, [David Reis](#) at 415.677.6360, [Dipanwita Amar](#) at 415.677.6366, [David Durham](#) at 415.677.6271 or your usual Howard Rice attorney.