



Please contact any of the attorneys in our [Labor and Employment Group](#) if you have any questions regarding this Labor and Employment alert.



Maurice Baskin
mnbaskin@Venable.com
 202.344.4823



Luisa Lopez
lmlopez@Venable.com
 202.344.4506

Final Rule on Notice of Employee Rights Covers Many *Non-Unionized* Employers

In December 2010, the National Labor Relations Board (“NLRB” or “Board”) announced its intent to implement a rule that would require most private-sector employers—**union and non-union**—to notify employees of their rights under the National Labor Relations Act (“NLRA”). Specifically, employers would be required to notify employees of their right to organize a union, to join or assist labor organizations, to bargain collectively, to engage in other concerted activities, to refrain from such activities, and the NLRB’s role in protecting statutory rights.

The Board accepted comments on its proposed rule until March 2011. Although the Board received approximately 7,000 comments, most of which opposed its proposed rule, the Board has now issued a Final Rule with few changes. The Final Rule was published in the Federal Register on August 30, and will take effect on **November 14, 2011**, unless a court injunction is requested and granted before then.

The Required Notice under the Board’s Final Rule

Coverage

The Final Rule applies to all employers who are subject to the NLRA, even if their workforce is not unionized. Federal government contractors are exempt if they are already complying with a similar notice posting requirement that was mandated last year by Executive Order of the President. It is estimated that as many as six million private employers are covered by this new requirement, including large and small businesses, for-profits and non-profits, and virtually all non-agricultural industries.

Content of the Required Notice

Under the Final Rule, the required notice entitled “Employee Rights under the National Labor Relations Act” would state that employees have the right to, among other things:

- organize a union to negotiate with their employers concerning their wages, hours, and other terms and conditions of employment;
- form, join or assist a union;
- discuss the terms and conditions of their employment or union organizing with their coworkers or a union;
- take action with one or more co-workers to improve their working conditions;
- strike and picket; or
- refrain from any of the above.

The notice will also list specific prohibited conduct and encourage employees to contact the NLRB if they believe their rights or the rights of others have been violated.

Physical Posting in the Workplace

Under the Final Rule, employers will be required to post the notice where other workplace notices on various required topics, such as EEO, Fair Labor Standards Act, Occupational Safety and Health Act, the Family and Medical Leave Act, and the Americans with Disabilities Act, are typically posted.

Electronic Posting

If an employer communicates with employees primarily by e-mail or other electronic means, the NLRB’s Final Rule will also require the employer to post the notice electronically. Thus, employers must also post the notice on an intranet or internet site if personnel rules and policies are customarily posted there. The Board dropped an earlier proposal to require sending out the notice by email.

Foreign Language Posting

If 20% of an employer’s workforce does not speak English, the employer must provide the notice in the language that the employees speak.

Can Employers Post Additional Statements About Unions?

Many have criticized the NLRB notice for failing to include information about decertification of unions, or the right of employees to object to paying dues, or the potential costs of unionization. Under Section 8(c) of the Act, employers have a protected right of free speech on these and similar topics. The Board has stated in the Final Rule that employers will be entitled to post additional communications, though employers should be careful not to say things that may interfere with employee rights under the Act.

Failure to Post Notice of Employee Rights

Under the Final Rule, if an employer fails to post the notice of employee rights, then the following can be awarded as a penalty: (1) the NLRB can consider such behavior an unfair labor practice under Section 8(a)(1) of the NLRA; (2) the NLRB can use such conduct as evidence of an employer's unlawful motive in unfair labor practice cases; and (3) it could toll the six-month statute of limitations for filing unfair labor practice charges (although tolling will not be automatic).

Legal Challenges to the Board's Final Rule

The Board's Rulemaking Authority

Many comments filed with the Board by private-sector employers and employer groups disputed the NLRB's statutory authority to enact the proposed rule in the first place. Dissenting Member Hayes argued strongly that the Act does not authorize the Board to require employers to bear such a notice-posting burden now for the first time in 76 years. Others have argued that the Board has failed to justify its actions in proposing and issuing the Final Rule when employees already have access to information of this type over the internet.

Employers should closely monitor the situation to learn whether a legal challenge has been filed that could affect whether the Rule will or will not take effect on November 14, 2011, but should be prepared to comply with the new notice requirements at that time.

For more information on the possible legal challenge to the Board's Final Rule, or on how to get in compliance with the notice requirement, contact [Maurice Baskin](#) or [Luisa Lopez](#) at Venable LLP.

If you have friends or colleagues who would find this alert useful, please invite them to subscribe at www.Venable.com/subscriptioncenter.

CALIFORNIA MARYLAND NEW YORK VIRGINIA WASHINGTON, DC

1.888.VENABLE | www.Venable.com