



October 2011

Legal Alert: Covered Employers Required to Post Notice of Employee NLRA Rights

The National Labor Relations Board (NLRB) has issued a final rule requiring private sector employers subject to the National Labor Relations Act (NLRA) to post an official government notice informing employees of their legal rights under the NLRA.¹ The rule will become effective January 1, 2012, and the notice must be posted on that day. NOTE: The rule was originally scheduled to be effective on November 14, 2011, and several business groups filed lawsuits challenging the NLRB's authority to make the rule. Unless those lawsuits are decided against the NLRB, covered employers should be ready to post the notice on January 1 of next year.

The NLRA was enacted in 1935 to protect the rights of employees and employers, encourage collective bargaining, and curtail certain harmful labor and management practices.² Employees covered by the NLRA are afforded certain rights, including the right to join together, whether with or without a union, in an effort to improve their wages and working conditions.³

The required notice informs employees of their right to act together to improve wages and working conditions; to form, join, and assist a union; or to refrain from such activity; to bargain collectively with their employer; and to engage in strikes, picketing, and other protected concerted activity. The notice also provides examples of unlawful conduct by employers and unions and instructs employees to contact the NLRB with questions or complaints.

Who Is a Covered Employer?

Most private sector employers (whether unionized or non-unionized) are subject to the NLRA and are therefore required to post the notice of employee rights pursuant to the new rule.⁴ The NLRB asserts jurisdiction over employers based on the type of their business and their gross annual volume of business; employers whose gross annual revenues reach a certain amount become subject to the NLRA.⁵

¹ See Press Release, National Labor Relations Board, *Board Issues Final Rule to Require Posting of NLRA Rights*, Aug. 30, 2011, <http://www.nlr.gov/news/board-issues-final-rule-require-posting-nlra-rights>; see also Fact Sheet, National Labor Relations Board, *Final Rule for Notification of Employee Rights*, <http://www.nlr.gov/news-media/fact-sheets/final-rule-notification-employee-rights>

² National Labor Relations Board, *National Labor Relations Act*, <http://www.nlr.gov/national-labor-relations-act>

³ See National Labor Relations Board, *Employee Rights*, <http://www.nlr.gov/rights-we-protect/employee-rights>

⁴ Agricultural, railroad, and airline employers are excluded from the NLRA's coverage.

⁵ If an employer can be classified within more than one of the categories for which different standards have been established, the NLRB has jurisdiction over the employer if the employer satisfies the revenue standards of any of the categories within which the employer may be classified.

For nonprofit charitable institutions, the revenue threshold depends on the entity's substantive purpose. The revenue threshold for social services organizations (other than those with activities for which a specific standard has already been set) is \$250,000. The threshold for art museums, cultural centers, libraries, and private nonprofit colleges and universities is \$1 million. The threshold for credit unions may be measured by the retail standard (\$500,000) or nonretail standard (\$50,000) depending on the nature of their operations. The standard for day care centers for children is \$250,000. Similarly, the threshold for law firms and legal services organizations is \$250,000 in gross revenues.

A more complete discussion of the NLRB's jurisdictional standards may be found on the NLRB website at http://www.nlr.gov/sites/default/files/documents/44/rc_outline_2008_full.pdf. If an employer is unsure whether it is covered by the NLRA the employer should seek assistance from legal counsel.

What Must be Posted?

The required notice, an 11x17 inch poster, must be posted in a "conspicuous" place readily seen by employees, such as where other workplace notices are typically posted. The notice must also be posted on an intranet or an internet site if personnel rules and policies are customarily posted there by the employer. The notice can be obtained free of charge from any of the NLRB regional offices⁶ or downloaded from the NLRB website at <https://www.nlr.gov/poster> and printed in either color or black-and-white. The notice is available online in two formats: a one-page 11 x 17 inch version or a two-page 8.5 x 11 inch version, which must be printed and taped together to form the required 11 x 17 inch poster. Translated versions of the notice will also be available and must be posted in workplaces where at least 20% of employees are not proficient in English.

What if an Employer Fails to Post the Notice?

Although the NLRB does not have the authority to levy fines for failure to post the required notice, such failure may be treated as an unfair labor practice under the NLRA and can be grounds for tolling (suspending) the 6-month statute of limitations for filing an unfair labor practice charge against the employer. The NLRB anticipates that, in most cases, an employer who fails to post the notice is unaware of the requirement and will comply when requested. In such cases, the unfair labor practice case will typically be closed without further action. However, if an employer knowingly and willingly fails to post the required notice, such failure may be considered evidence of unlawful motive in an unfair labor practice case alleging other violations of the NLRA.

General Recommendations

Before the new posting requirement becomes effective on January 1, 2012, employers should first determine if they are covered by the NLRA and are required to post the notice and if so, begin compliance efforts as soon as possible. Employers should develop an appropriate plan for compliance with the posting requirement, including identifying where and how the notices should be posted and whether, based on their customary practices and workforce,

⁶ The contact information for the NLRB regional offices is available at <https://www.nlr.gov/who-we-are/regional-offices>

internet/intranet and/or alternative language postings are required. In addition, covered employers are encouraged to obtain legal assistance to review all of their human resource policies for compliance with the NLRA. Employers should also consider providing information and training about the notice and regarding the concept of unionization to managers and supervisors in anticipation of employee questions and to ensure their compliance under the NLRA.

Pending Challenges to the Posting Rule

The NLRB's notice posting rule currently faces both legal and legislative challenges.⁷ However, these challenges may not be resolved prior to the effective date of the rule and therefore, employers are encouraged to comply with the posting requirement until such resolution.

This alert is meant to provide general information only, not legal advice. Please contact Judith Moldover at Lawyers Alliance for New York at (212) 219-1800 x 250 or visit our website www.lawyersalliance.org for further information.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Our network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits and communities, we help nonprofits to develop affordable housing, stimulate economic development, promote community arts, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers.

⁷ For example, the National Association of Manufacturers, the National Right to Work Legal Defense and Education Foundation, and the National Federation of Independent Businesses have filed lawsuits challenging the NLRB's authority to implement the rule. Additionally, two legislative bills, the Employee Workplace Freedom Act and the Employer Free Choice Act, have been introduced in the House of Representatives seeking to repeal the posting rule.