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## Private Non-Unionized Employers Now Required To Post NLRB Notice Of Union Organizing Rights

September 2011

On August 25, 2011, the National Labor Relations Board issued a Final Rule which requires a majority of non-unionized private employers conducting business in the U.S. to post a “Notice of Employee Rights” apprising employees of their rights under the National Labor Relations Act, including the right to organize and strike. **This posting requirement goes into effect November 14, 2011.**

The Notice states, in pertinent part, that employees have the right under the NLRA to:

- Organize a union to negotiate with their employer concerning their wages, hours, and other terms and conditions of employment.
- Bargain collectively through representatives of the employees’ own choosing for a contract with their employer setting their wages, benefits, hours, and other working conditions.
- Discuss their terms and conditions of employment or union organizing with their co-workers or a union.
- Take action with one or more co-workers to improve 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.



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In addition to the physical posting of the Notice, the rule requires every covered employer to post the notice on an internet site or intranet site, if personnel rules and policies are customarily posted there by the employer. The Notice will be provided at no charge by NLRB regional offices or can be downloaded from the Board website and printed in color or black-and-white. Translated versions will be available, and must be posted at workplaces where at least 20% of employees are not proficient in English.<sup>1</sup>

The National Labor Relations Board has provided a list of responses to frequently asked questions which will enable employers to navigate their compliance obligations with respect to this new rule, as follows:<sup>2</sup>

#### **Questions and Answers:**

##### **Does my company have to post the notice?**

The posting requirement applies to all private-sector employers (including labor unions) subject to the National Labor Relations Act, which excludes agricultural, railroad and airline employers. In response to comments received after the proposed rule was announced, the Board has agreed to exempt the U.S. Postal Service for the time being because of that organization's unique rules under the Act.

##### **When will the notice posting be required?**

The final rule takes effect 75 days after it is posted in the Federal Register, or on November 14, 2011.

##### **There is no union in my workplace; will I still have to post the notice?**

Yes. Because NLRA rights apply to union and non-union workplaces, all employers subject to the Board's jurisdiction (aside from the USPS) will be required to post the notice.

##### **I am a federal contractor. Will I have to post the notice?**

The Board's notice posting rule will apply to federal contractors, who already are required by the Department of Labor to post a similar notice of employee rights. A contractor will be



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regarded as complying with the Board's notice posting rule if it posts the Department of Labor's notice.

### **I operate a small business. Will I have to post the Board's notice?**

The rule applies to all employers subject to the Board's jurisdiction, other than the U.S. Postal Service. The Board has chosen not to assert its jurisdiction over very small employers whose annual volume of business is not large enough to have more than a slight effect on interstate commerce. The jurisdictional standards are summarized in the rule.<sup>3</sup>

### **How will I get the notice?**

The Board will provide copies of the notice on request at no cost to the employer beginning on or before November 1, 2011. These can be obtained by contacting the NLRB at its headquarters or its regional, sub-regional, or resident offices. Employers can also download the notice from the Board's website and print it out in color or black-and-white on one 11-by-17-inch paper or two 8-by-11-inch papers taped together. Finally, employers can satisfy the rule by purchasing and posting a set of workplace posters from a commercial supplier.

### **What if I communicate with employees electronically?**

In addition to the physical posting, the rule requires every covered employer to post the notice on an internet or intranet site if personnel rules and policies are customarily posted there. Employers are not required to distribute the posting by email, Twitter or other electronic means.

### **Many of my employees speak a language other than English. Will I still have to post the notice?**

Yes. The notice must be posted in English and in another language if at least 20% of employees are not proficient in English and speak the other language. The Board will provide translations of the notice, and of the required link to the Board's website, in the appropriate languages.



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**Will I have to maintain records or submit reports under the Board's rule?**

No, the rule has no record-keeping or reporting requirements.

**How will the Board enforce the rule?**

Failure to post the notice may be treated as an unfair labor practice under the National Labor Relations Act. The Board investigates allegations of unfair labor practices made by employees, unions, employers, or other persons, but does not initiate enforcement action on its own.

**What will be the consequences for failing to post the notice?**

The Board expects that, in most cases, employers who fail to post the notice are unaware of the rule and will comply when requested by a Board agent. In such cases, the unfair labor practice case will typically be closed without further action. The Board also may extend the 6-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer. If an employer knowingly and willfully fails to post the notice, the failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

**Can an employer be fined for failing to post the notice?**

No, the Board does not have the authority to levy fines.

**Was there a public comment period? What was the response?**

The Board received more than 7,000 public comments after posting a notice of the proposed rule in the Federal Register. A detailed description of the comments and the Board's response to them, including responsive modifications to the rule, may be found in the Preamble to the Final Rule.

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<sup>1</sup> The required posting can be obtained from the Department of Labor website at: [http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17\\_Final.pdf](http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17_Final.pdf).



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<sup>2</sup> Available at: <http://www.nlr.gov/node/1526>.

<sup>3</sup> The proposed rule would apply only to employers covered by the NLRA. This does not include any governmental organization (federal, state or local) or employers subject to the Railway Labor Act. In addition, it only applies to private businesses that meet the Board's jurisdictional standards, which include "retail" and "non-retail" thresholds. The "retail" standard is gross annual volume of business of \$500,000, but the jurisdictional threshold could be less, depending on the industry. The "nonretail" standard is met when an employer, directly or indirectly, sells or purchases goods or services of at least \$50,000 outside the state in which it is located.

If you have any questions about this client alert, please contact [Jon Daryanani](#) or any other member of Loeb & Loeb's [Employment and Labor](#) practice group.

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