

NATIONAL LABOR RELATIONS BOARD TO REQUIRE POSTING OF NOTICE OF EMPLOYEE RIGHTS

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The National Labor Relations Board (NLRB) has issued a new 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 will take effect **January 31, 2012**.

WHO IS SUBJECT TO THE NOTICE REQUIREMENT?

Most employers are subject to the Notice requirement, so it is actually easier to specify which employers are *not*. 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.

In California, public school and charter school employers have been deemed exempt from the NLRB's jurisdiction as political subdivisions. However, it is important to note that federal authorities have ruled otherwise in other states. Additionally, employers that exclusively employ workers who are excluded from the definition of "employee" under



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§104.201 are not required to post the Notice. The Notice requirement also does not apply to entities over which the Board has chosen not to assert jurisdiction or been found not to have jurisdiction. Entities whose impact on interstate commerce is so slight that they do not meet the Board's discretionary jurisdiction standards are also exempt from the rule. Additionally, the U.S. Postal Service is not required to comply with the Notice requirement. If you are unsure whether you are required to comply, you should contact your attorney.

POSTING OF THE NOTICE

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." Please click on the link below to review the language and download a PDF of the required Notice.

<https://www.nlr.gov/poster>

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 [here](#).¹ Additionally, the Board has published a helpful fact sheet addressing some questions that may arise regarding the Final Rule. The fact sheet is available on the NLRB website [here](#).² 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, need not be in color. The Board will furnish paper copies to employers who request them. Alternatively, employers can download the notice 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 put together to form the 11x17-inch poster.

ELECTRONIC POSTING REQUIREMENT

In addition to posting the Notice physically in their facilities, employers who customarily post notices to employees regarding personnel rules, laws 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.” 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.

FOREIGN LANGUAGE REQUIREMENT

If as many as twenty 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 twenty 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 twenty 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.nlrb.gov, where they can

obtain copies of the notice in their respective languages.

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 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 are more familiar with the requirements of the Act. 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:

The U.S. Chamber and the South Carolina Chamber of Commerce recently filed a lawsuit against the NLRB challenging the Board’s new rule. The Chamber’s lawsuit alleges that the NLRB’s final rule violates the NLRA, the Administrative

Procedure Act, the Regulatory Flexibility Act, and the First Amendment. More lawsuits challenging the notice requirement are likely to be filed. However, unless there is court action delaying implementation of the Final Rule, employers must be prepared to comply with the posting requirement when it becomes effective. 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. Therefore, 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.

Hollis Peterson is an associate in Procopio’s Labor & Employment group. She represents management in all aspects of labor relations, including the interpretation and administration of labor agreements, collective bargaining and other labor union contract negotiations, the legal aspects of reductions in force, and disputes arising under the National Labor Relations Act. She also represents employers in a broad range of employment litigation matters.

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¹ Full URL for the Final Rule, published August 30, 2011 in the Federal Register: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-30/pdf/2011-21724.pdf>

² Full URL for the fact sheet available on the NLRB website: <http://www.nlrb.gov/faq/poster>