

Legal Update

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NLRB POSTING REQUIREMENT HAS BROAD APPLICATION

By Jon Vegosen

The National Labor Relations Board (NLRB) recently adopted a rule that requires most employers to post a notice in the workplace setting forth employee rights under the National Labor Relations Act (NLRA). The deadline for posting the notice has been extended to January 31, 2012. This newsletter, in question and answer format, provides an overview of the NLRB's rule.

We don't have a union. Do I need to comply with this rule?

Yes, you do. The rule and the posting requirement apply irrespective of whether an employer has a unionized workforce.

What does the rule provide?

The rule provides that, by January 31, 2012, all private-sector employers that are covered by the NLRB (including those without unions) are required to conspicuously post in their workplaces an NLRB notice of employee rights under the NLRA. The notice belongs where other notifications of workplace rights and employer rules and policies are posted. Employers also should publish a link to the notice on an internal or external website if other personnel policies or workplace notices are posted there. Employers are not required to distribute the posting by e-mail or other electronic means, such as Twitter.

Does this rule cover small business owners?

Generally, yes. Most employers are covered by the rule, including most small business owners. Some very small employers whose annual volume of business is not large enough to have more than a slight effect on interstate commerce are exempt.

With regard to retail businesses, including home construction, the NLRB's jurisdiction covers any employer with a gross annual volume of business of \$500,000 or more.

With regard to non-retail businesses, the NLRB's jurisdiction extends to most employers. It is based on the amount of goods sold or services provided by the employer out of state (called "outflow") or goods or services purchased by the employer from out of state (called "inflow"), even indirectly. Under the standard, the NLRB asserts jurisdiction over an employer with an annual inflow or outflow of at least \$50,000.

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There are other categories of employers not included in this newsletter with different jurisdictional amounts.

What is included in the notice?

The notice states that the NLRA guarantees employees the right to organize and bargain collectively with their employers and that they may engage in other protected concerted activity or refrain from engaging in such activity. The notice lists specific rights employees have under the NLRA, including the right to join a union and the right to discuss their wages, benefits, and other terms and conditions of employment with their fellow employees or a union. The notice also sets forth actions that an employer and a union are prohibited from taking.

Why was this rule passed?

The NLRB believes that many employees protected by the NLRA are unaware of their legal rights and that the rule will increase knowledge of the NLRA among employees, in order to better enable the exercise of rights under the NLRA. A beneficial side effect may well be the promotion of statutory compliance by employers and unions.

What should we do if employees speak a language other than English?

The notice must be posted in English and in another language if at least 20% of the employer's 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. If a translation of the appropriate language is not available, the employer will not be liable for non-compliance. If a workforce includes two or more groups, each comprising at least 20% of the workforce, who speak different languages, the employer must post the notice in the language spoken by the larger group, and then may either post the notice in the language(s) spoken by the other group(s) or, at the employer's option, distribute copies of the notice to those employees in their language(s). If such an employer is also required to post the notice electronically, it must do so in each of those languages.

Where can we obtain an authorized poster?

An NLRA authorized poster can be downloaded from www.nlr.gov/poster. You should print the poster on a single 11" x 17" sheet of paper or on two 8" x 11" papers taped together. You can also obtain free copies of the notice from any regional NLRB office: <https://www.nlr.gov/who-we-are/regional-offices>. You can also comply with the rule by purchasing and posting the poster from a commercial supplier.

What are the consequences of failing to post the notice?

A failure to post the notice would be regarded as an unfair labor practice under the NLRA. It should be noted that any such failure would need to be brought to the NLRB's attention through an unfair labor practice charged filed by an employee, union, or other person. If an employer were unaware of the requirement and promptly complies, that would likely end the matter. If, however, an employer

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knowingly and intentionally fails to post the notice, such conduct might be considered as evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA. The Board does not have authority to levy any fines against an employer that does not comply with the rule.

Does the Board's rule require that employers maintain records or submit reports?

No. The rule does not have any record-keeping or reporting requirements.

Have there been any challenges to the rule?

Yes. Some business organizations have filed suit to prevent the rule's notice posting requirement from taking effect. They have claimed, among other things, that the NLRB has exceeded its authority to require employers to display the poster. Absent a court ruling to the contrary or another delay with respect to the effective date of the rule, the requirement will take effect January 31, 2012.

What do I do now?

Determine whether your organization qualifies for an exemption from the rule and, if no exemption applies, obtain and post the NLRB poster by January 31, 2012. If you need additional information or assistance in determining whether the rule applies to your organization, feel free to contact FVLD.

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