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# make room on the bulletin board – nlr imposes new notice requirement on employers

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*MSK Client Alert*

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On August 25, 2011, the National Labor Relations Board (“NLRB”) released its Final Rule imposing a new mandatory posting requirement on most private sector employers. This new notice, informing employees of their rights under the National Labor Relations Act (“NLRA”), must be posted as of the effective date of the Final Rule on November 14, 2011.

## **Notice of Employee Rights**

Among the rights guaranteed to employees and delineated in this notice are the following:

- the right to organize a union that negotiates with the employer “concerning wages, hours, and other terms and conditions of employment”;
- the right to “form, join or assist a union”;
- the right to bargain collectively through representatives;
- the right to have discussions with co-workers about wages, benefits, additional terms and conditions of employment, and union organizing;
- the right to “take action with one or more co-workers to improve . . . working conditions by, among other means, raising work-related complaints with [the] employer or with a government agency and seeking help from a union”;
- the right to strike and picket; and
- the right *not* to join a union, remain a union member, or participate in union activities.

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### Notice of Prohibited Employer Acts

Also set forth in the mandatory notice are the following activities in which employers *may not engage*, including:

- prohibiting talk or solicitation (including literature distribution) of union activity during nonwork periods;
- questioning employees about union involvement in a way that discourages such involvement;
- “firing[, demoting[, or transferring]” or taking other negative employment actions against employees due to their union involvement or because of engagement in “concerted activity for mutual aid and protection”;
- threatening to close a branch or workplace if employees choose union representation;
- promising “promotions, pay raises, or other benefits to discourage or encourage union support”;
- spying on or taping (or pretending to do so) union activities and meetings; and
- prohibiting “union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.”

### Broad Application of the Mandatory Notice Posting Requirement

The NLRA covers most private-sector employers who are deemed to be “in interstate commerce” (see below) and have at least two employees. The only employers exempt from the NLRA (and this mandatory notice posting requirement) are those in the railroad and aviation industries covered by the Railway Labor Act; government employers (including the Federal Reserve bank and the U.S. Postal Service); and certain employers of agricultural employees or domestic workers. Even unions are covered by the NLRA and this posting requirement when they act as employers.

Employers who are federal government contractors already have analogous posting requirements mandated by the U.S. Department of Labor (“DOL”) and, as explained below, are exempt from this additional notice posting obligation.

Employers are deemed to be “in interstate commerce” and subject to NLRA jurisdiction if they meet certain minimal gross revenue or purchase/sale thresholds. For example, the general retail standard for NLRA coverage is gross business volume of at least \$500,000. Purchases/sales of as little as \$50,000 can be enough for NLRA jurisdiction, the standards for which are noted in §104.204 of the Final Rule, which can be found [HERE](#), see its Section 104.204(d)(1)(ii).

### Content, Manner, and Location of Posting the Required Notice

The Final Rule is quite specific about the content, manner, and location of posting the required notice. It must be posted in the same location as other employment notices; it must be in 11-inch by 17-inch form (either on one document or two 8-inch by 11-inch documents taped together), in color or black and white; and the specific language may be obtained by contacting the NLRB or its regional offices for copies provided at no cost on or



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before November 1, 2011, or downloading from the NLRB website, [www.nlrB.gov](http://www.nlrB.gov).

In addition to physical posting of the notice, every covered employer who typically posts personnel rules and policies on an internet or intranet site is required to do so with this notice.

Finally, if at least 20% of a worksite's employees speak one or more languages other than English, the employer must additionally post the required notice in that/those language(s). The NLRB is supposed to provide translations of the required notice and a link to the Board's website in the appropriate language(s).

### **Consequences of Failing to Post**

While there are no reporting or record-keeping requirements for employers regarding the posting of the required notice, there are adverse consequences for failing to post. NLRA-covered employers who fail to post the requisite notice may be charged with an unfair labor practice for violating NLRA Section 8(a)(1), which prohibits employer actions that "interfere with, restrain or coerce employees" in their exercise of rights guaranteed by the NLRA. Such a charge could result in a cease-and-desist order to stop ongoing noncompliance and to impose "additional remedies."

The NLRB anticipates that some employers may fail to post the notice due to lack of awareness regarding the Final Rule and believes that those employers will comply when the requirement is brought to their attention "without the need for formal action or litigation." While that might help very small employers, a knowing, willful failure to post the notice may be considered evidence of unlawful motive in an unfair labor practice case, particularly if any other violations of the NLRA are alleged. In addition, it is likely that failure to post the required notice will be deemed to extend the six-month limitation period for filing an unfair labor charge, which could have the effect of eliminating any limitation period.

### **Responses to the Final Rule and HR Implications**

Response to the Final Rule and to its predecessor Proposed Rule of December 22, 2010, has been decidedly mixed. The stated intent of the Proposed Rule is to inform employees who may otherwise be uninformed about their rights – a group including recent graduates entering the work force, immigrants, and the increasing percentage of nonunion employees.

The NLRB received over 7,000 comments concerning the Proposed Rule, most of which opposed all or part of it. Many of those comments questioned the NLRB's statutory authority to require all employers to post a mandatory notice to their employees. Other responses, particularly from employers and employer groups, contended that the notice content was unbalanced and appeared to promote unionization and/or workplace unrest and conflict. Still others complained of the cost of compliance, which the NLRB noted to be minimal, even considering the necessary replacement of notices torn down, perhaps by employees seeking to entrap their employer in noncompliance.



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Some opposing groups still believe this new notice-posting mandate will be challenged in court and ultimately rescinded. Many of the views opposing the Final Rule were well summarized by NLRB Member Hayes, the lone Republican and sole dissenting vote, who called the Final Rule an attempt “to reverse the steady downward trend in union density.”

The implementation of the Final Rule in November may result in questions, concerns, and actions by employees, especially in businesses that have never been unionized. It is important that Human Resources staff and supervisors be updated and trained regarding the information contained in the notice and be prepared to deal with employees about it.

For those wishing to explore the Final Rule in further depth, it may be accessed in full [HERE](#).

### **ASK MSK - Q&A Section**

#### **Q: If an employer's workplace is not unionized, does it have to post the notice?**

A: Yes. The NLRA applies to all covered employers, whether or not their employees are currently represented by a union. Indeed, one stated purpose of the notice requirement is to inform unrepresented employees of their right to form, join, or assist a labor organization.

#### **Q: If an employer is already a federal contractor, will it be required to post the new notice?**

A: Federal contractors are already required to post a similar notice of employee rights by the DOL. Those contractors already posting the DOL notice will be regarded as being in compliance with the NLRB posting requirement.

#### **Q: Does a small business have to post the NLRB notice?**

A: Yes, if the business comes under the NLRA's jurisdiction on the basis of its annual volume of business or purchases/sales. The jurisdictional standards are summarized in the Final Rule in Section 104.204(d)(1)(ii), searchable [HERE](#).

#### **Q: If there is no unionization and no interest in unionization in a particular business, why does the Final Rule apply?**

A: In addition to informing employees of their rights about unionizing, there are actions outside of union involvement protected by the NLRA and addressed in the Final Rule – for example, the right of all employees to discuss wages, benefits, and other terms and conditions of employment with co-workers; to take action with co-workers to improve working conditions; to raise work-related complaints with an employer or government agency; and to be protected from adverse employment action for “engagelng] in concerted activity for mutual aid and protection.”



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**Q: What is likely to occur as a result of the Final Rule's implementation?**

A: There may be a range of employee responses, particularly in nonunion workplaces. HR staff and supervisors should be trained in how to handle employee questions and actions.

**Q: What else is the NLRB going to do to employers?**

A: Perhaps nothing. The NLRB Chairman's term ended on August 27, 2011, leaving the NLRB with three active members, one of whom (Democrat Craig Becker) has a recess appointment expiring in December 2011. The U.S. Supreme Court previously decided that the NLRB needs at least three active members to make rulings. In the current political climate in Washington, D.C., after Member Becker leaves in December, it might be some time before the NLRB gains its third active member.