

# NAW Legal Advisory

## NLRB Final Rule Requires Private-Sector Employers to Post Notice of Employee Labor Law Rights

Updated August 2011

On a 3 to 1 vote, the National Labor Relations Board (NLRB) has issued a final rule requiring most private-sector employers (**whether or not they have union workers**) to post a notice in the workplace to notify employees of their rights under the National Labor Relations Act (Act) to engage in collective bargaining and join a union. (76 Fed. Reg. 54006, August 30, 2011). The final rule may be viewed at: <http://www.gpo.gov/fdsys/pkg/FR-2011-08-30/pdf/2011-21724.pdf>

Employers must begin posting the notice in the workplace by November 14, 2011. Agricultural, railroad and airline employers are not covered by the Act and therefore not subject to this new rule. Retail businesses with less than \$500,000 in annual sales and other businesses that produce less than \$50,000 in annual interstate sales are exempt from the posting requirement. The U.S. Postal Service is also exempt. Copies of the required notice will be available on the NLRB website by November 1, 2011. The text of the notice appears in the Federal Register, Volume 76, pp. 54048-54049. The text of the final rule begins on page 54046.

**Federal Contractors** – Certain federal contractors and subcontractors are already required by the Department of Labor to post a similar notice of employee rights. Contractors that comply with the Labor Department notice-posting rule (29 CFR Part 471) will also be deemed to comply with this NLRB rule.

**Physical Posting** – The employee notice must be posted in conspicuous places in the workplace where they are readily seen by employees, including areas where notices on personnel rules and policies are posted. Only an exact duplicate of the NLRB-supplied notice, 11 by 17 inches in size, may be used. No alterations in size, content, format, or type size or style may be used. Translated versions of the notice will be provided by the NLRB and must be posted when at least 20 percent of the workforce is not proficient in English, in the language spoken by this employee sub-group.

**Electronic Posting** – An employer that customarily communicates with its employees about personnel rules and policies on an intranet or internet site must **also** post the required notice on the employer's site as prescribed in the rule. However, employers are **not** required to distribute the notice to employees by email, voicemail, texting or other electronic means.

**Recordkeeping** – There are no employer recordkeeping or reporting requirements. However, employers should consider maintaining adequate documentation of compliance with the rule.

**Enforcement of the Rule** – Failure to comply with the rule is considered an unfair labor practice under the Act that may be reported by an employee to the NLRB. An employer may not threaten or retaliate against the employee for filing a charge. If after investigation the Board finds the employer failed to post the notice as required, the employer will be ordered to do so. As an additional penalty against the employer, the NLRB may "excuse" employees who fail to file an unfair labor practice

charge on time (the Act sets a 6 month deadline). Finally, the NLRB empowers itself to consider an employer's knowing and willful refusal to post the notice as evidence of anti-union animus.

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*NAW, the Coalition for a Democratic Workplace (CDW – which NAW helps manage), and other organizations argued in their comments on the rule that the Board does not have the statutory authority to mandate the posting of this notice. The proposed rule generated over 7,000 comments, the majority of which were in opposition. Several organizations are currently discussing whether to file a legal challenge to the rule based on the argument that the Board exceeded its authority. In his written dissent, NLRB member Brian Hayes declared "I am confident that a reviewing court will soon rescue the Board from itself" and declare this rule an unauthorized exercise of rulemaking authority. Even if the rule is challenged in court, posting the notice will be required on November 14, 2011, unless a court enjoins enforcement of the rule pending final outcome of the litigation.*