



September 9, 2011

LABOR LAW UPDATE

FOLLOW-UP ON FINAL NLRB RULE REQUIRING EMPLOYERS TO POST NOTICE OF EMPLOYEE RIGHTS UNDER THE NLRA

In our [August 25, 2011 Bullard Alert](#), we discussed the final rule implemented earlier that day by the National Labor Relations Board (“NLRB”). The final rule requires employers covered by the National Labor Relations Act (“NLRA”) to post a Notice informing employees of their rights under the NLRA. Pursuant to that rule, employers will be required to post that Notice on November 14, 2011.

Along with its final rule, the NLRB also issued a [Fact Sheet](#) that provides answers to commonly-asked questions about the new rule. Here are the Questions and Answers provided on that Fact Sheet.

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

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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 a more than a slight effect on interstate commerce. The jurisdictional standards are summarized in the rule.

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.

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.

The impact of this Notice posting requirement on employers could be substantial. At a minimum, employees will be much more informed about their rights under the NLRA than they were before, and may be prompted to seek out union representation. Even if you are not being targeted by a labor organization, your employees will now also be more aware of the type of employer conduct that constitutes grounds for an unfair labor practice charge. Naturally, that awareness will increase the possibility that employees will file unfair labor practice charges against you.

Between now and the November 14 required posting date, employers should review their vulnerability to union organizing campaigns. Here are some of the issues you should address.

- ◆ Do you have method for monitoring employee satisfaction?
- ◆ Do you regularly solicit feedback from employees and remedy any issues that are identified?
- ◆ Are your wages and benefits packages competitive in today's market?
- ◆ Do you regularly address health and safety concerns?
- ◆ Do you have in place effective employee complaint procedures?
- ◆ When was the last time you reviewed your employee policies? Are any of them "overbroad" under the NLRA?
- ◆ Do you know who your supervisors and "confidential" employees are and who might be in and out of a potential bargaining unit?
- ◆ Do you have job descriptions for all of your jobs?
- ◆ Are your front-line supervisors trained to spot the early signs of union organizing? If so, do they know the persons to whom to report that information?

Please do not hesitate to contact us if you would like assistance in auditing your company's vulnerability to union organizing campaigns.

A copy of the proposed Notice, which will be printed on 11"x17" paper, is attached as an appendix to this Bullard Alert. Official Notices will be available from the NLRB on or before November 1, 2011; those notices will be available for pick-up in the NLRB's Regional Offices and/or for download from its website at www.nlr.gov. Please contact us if you would like assistance in obtaining copies of the Notice.

We will be discussing this new rule, along with numerous other collective bargaining and union organizing issues, on September 14, 2011 at our [First Annual Labor Law Symposium](#).

~JENNIFER A. SABOVIK

Appendix A

SAMPLE NOTICE

EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA) guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity or to refrain from engaging in any of the above activity. Employees covered by the NLRA are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

“Under the NLRA, you have the right to:

- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
- Form, join or assist a union.
- Bargain collectively through representatives of employees’ own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
- Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
- Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints 187 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.

“Under the NLRA, it is illegal for your employer to:

- Prohibit you from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in nonwork areas, such as parking lots or break rooms.
- Question you about your union support or activities in a manner that discourages you from engaging in that activity.
- Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.
- Threaten to close your workplace if workers choose a union to represent them.

- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.
- Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

“Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

- Threaten or coerce you in order to gain your support for the union.
- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.
- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.
- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.
- Take adverse action against you because you have not joined or do not support the union.

“If you and your co-workers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly represent you in bargaining and enforcing the agreement.

“Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should seek assistance from the nearest regional NLRB office, which can be found on the Agency’s Web site: <http://www.nlr.gov>.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired. If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB’s Web site or by calling the toll-free numbers listed above.

“The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

“This is an official Government Notice and must not be defaced by anyone.”

Notice reprinted from 76 FR 54006, 54048-54049 (August 30, 2011) at Appendix A.