

Questions and Answers: “Employee Rights under the NLRA” Poster Requirement

The National Labor Relations Board (NLRB) issued a final rule requiring most private-sector employers to notify employees of their rights under the National Labor Relations Act (NLRA) through a required poster.

The NLRA posting date has been delayed indefinitely by the NLRB. As a result of ongoing litigation, the NLRB has delayed implementation of the poster requirement until issues can be resolved by the courts. Currently, there is no effective implementation date for the poster. CalChamber will keep you up-to-date as to any changes related to the poster requirement, including any court or agency decisions affecting California employers.

This document attempts to answer questions that many employers may have regarding the poster requirement. This document was compiled using information from the final rule and the NLRB’s own fact sheet found on its website at www.nlr.gov.

Q: Will CalChamber have the poster available?

A: Yes. CalChamber prepared a compliant product. **Currently, there is no mandatory posting deadline.** CalChamber has the NLRA poster available as a separate notice in the event that the NLRB implements a new posting deadline. You can order your poster at www.calchamber.com/poster.

Q: What is the general purpose of the posting requirement?

A: The NLRA was enacted in 1935, and regulates most private-sector labor-management relations in the United States. The NLRB contends that “many employees protected by the NLRA are unaware of their rights under the statute and that the rule will increase knowledge of the NLRA among employees.” The notice will provide information about the rights of employees to act together to improve wages and working conditions; to form, join and assist a union; to bargain collectively with their employer; and to refrain from any of these activities. It will also provide examples of unlawful employer and union conduct and instruct employees how to contact the NLRB with questions or complaints. Specific language for the notice is provided by the NLRB in the final rule.

Q: When will the poster requirement take effect?

A: Due to legal challenges to this poster requirement, the NLRB has delayed the posting date until issues can be resolved by the courts. CalChamber will keep you up-to-date on any changes related to the poster requirement.

Q: Is my company covered by this requirement?

A: The poster requirement applies to all private-sector employers that are subject to the NLRA and the jurisdiction of the NLRB. Generally, the NLRB’s jurisdiction is very broad and covers the majority of private-sector employers in the United States.

The NLRB has jurisdiction over private-sector employers whose activity in interstate commerce exceeds a minimal level. This includes most small businesses. Some very small businesses will not be subject to the poster requirement because they are not under the NLRB’s jurisdiction. Some specific employers are excluded (see discussion below).

- The NLRB examines jurisdictional issues (whether an employer is covered) on a case-by-case basis, and the existing law is highly complex. Small businesses who are unsure if they are under the NLRB's jurisdiction and subject to this poster requirement should consult with labor counsel.

The NLRB generally applies two standards to determine if it has jurisdiction: the retail standard and the nonretail standard. A more complete discussion of the NLRB's jurisdictional standards may be found in *An Outline of Law and Procedure in Representation Cases*, Chapter 1, on the NLRB's website, www.nlr.gov.

Retailers

Employers in retail businesses fall under the NLRB's jurisdiction (and are thus subject to the poster requirement) if they have a gross annual volume of business of \$500,000 or more. This also includes employers in home construction, amusement industry, apartment houses and condominiums, cemeteries, casinos, hotels and motels, restaurants and private clubs, and taxi services. Shopping centers and office buildings have a lower threshold of \$100,000 per year.

Non-retailers

The non-retail standard applies to most other employers. Jurisdiction is based on the amount of goods sold or services provided by the employer out of state (outflow) or purchased by the employer from out of state (inflow). The NLRB will take jurisdiction when an annual inflow or outflow is at least \$50,000.

Special Categories

The NLRB also exercises jurisdiction over the following special categories of employers:

Channels of interstate commerce: For businesses providing essential links in the transportation of goods or passengers, including trucking and shipping companies, private bus companies, and warehouses and packing houses, the minimum is \$50,000 in gross annual volume.

Health care and child care institutions: Hospitals, medical and dental offices, social services organizations, child care centers and residential care centers with a gross annual volume of at least \$250,000 are under the NLRB's jurisdiction; for nursing homes and visiting nurses associations, the minimum is \$100,000 in gross annual volume.

Law firms and legal service organizations: The minimum is \$250,000 in gross annual volume.

Cultural and educational centers: For private and non-profit colleges, universities and other schools, art museums and symphony orchestras, the annual minimum is \$1 million in gross annual volume.

Native American tribes: The Board asserts jurisdiction over the commercial enterprises owned and operated by Native American tribes, even if they are located on a tribal reservation. But the NLRB does not assert jurisdiction over tribal enterprises that carry out traditional tribal or governmental functions.

Specifically Excluded Employers

The following employers are excluded from NLRB jurisdiction by statute or regulation:

- Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations.
- Employers who employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery.
- Employers subject to the Railway Labor Act, such as interstate railroads and airlines.

Q: I don't have a union at my workplace. Am I still required to post the notice?

A: Yes. Rights under the NLRA apply to union and non-union workplaces. All employers subject to the NLRB's jurisdiction will be required to post the notice.

Q: I am a federal contractor who is already required to post a similar notice. Must I also post this notice?

A: The posting requirement will apply to federal contractors who are already required by the federal Department of Labor to post a similar notice of employee rights. However, a contractor will be regarded as complying with the NLRB's notice posting rule if the contractor posts the Department of Labor's notice.

Q: I operate a religiously affiliated institution. Am I required to post this notice?

A: Religiously-affiliated employers are advised to contact legal counsel and/or their nearest NLRB Regional Office to determine if they are covered. This issue is highly complex.

Q: My organization is a non-profit. Am I required to post this notice?

A: Yes. Non-profit organizations generally are not exempted from the NLRA and are required to post the notice. Whether a non-profit charitable institution is covered by the NLRA and subject to the poster requirement may depend on the entity's substantive purpose. Such entities are advised to contact legal counsel and/or their nearest NLRB Regional Office to determine if they are covered.

Q: Where am I required to physically post the notice?

A: The employee notice must be posted in a conspicuous place where it is readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted. Employers are required to post the notice at workplaces in the United States and its territories, but not at those worksites in foreign countries. Reasonable steps should be taken to ensure that the notice is not altered, defaced or covered by any other material, or otherwise rendered unreadable.

Q: My employees work remotely and would not see the posting in the main office. What am I required to do?

A: Employers with remote worksites in the United States must post the notice at those other locations to ensure that all employees are notified of the rights under the NLRA.

Q: I run a referral business where I send employees to work at my client's premises. What are my obligations?

A: Employers are required to post a notice only on their own premises or at worksites where the employer has the ability to post a notice or cause a notice to be posted directed to their own employees. Employers who dispatch employees to worksites owned and operated by a client are not responsible for posting a notice there.

Q: Am I required to electronically post the notice in any manner?

A: In addition to the physical posting, employers are required 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 notice by email, social media or other electronic means. For specific instructions on how to provide electronic notice to employees, refer to the NLRB website at www.nlr.gov.

Q: Do we know the exact format and size of the notice?

A: The size of the notice must be at least 11" x 17". The NLRB prescribed the exact format, type size and style. CalChamber has a compliance product available.

Q: Will I be required to post the notice in languages other than English?

A: The notice must be posted in English and in another language if at least 20 percent of the employees are not proficient in English and speak the other language. If an employer's workforce includes two or more groups, each constituting at least 20 percent of the workforce, who speak different languages, the employer must post the notice in the language spoken by the larger group. The employer 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). The NLRB will provide translations of the notice. CalChamber will provide a Spanish version of the poster.

If you are also required to post the notice electronically, you must do so in each of those languages.

Q: What happens if I don't comply with the posting requirement?

A: Failure to post the notice may be used as evidence of an unfair labor practice under the NLRA. The NLRB investigates allegations of unfair labor practices. The NLRB does not have the authority to issue fines, but can take other remedial action. The NLRB does not audit workplaces or initiate enforcement actions on its own. Instead, the rule contemplates that a failure to comply will be brought to the attention of the NLRB through a complaint from an employee or union representative who is lawfully on the premises.

Normally, the NLRB "will determine whether an employer is in compliance when a person files an unfair labor practice charge with the NLRB alleging that the employer has failed to post the required notice." Filing this charge sets in motion the NLRB's procedures for investigating and adjudicating alleged unfair labor practices and for remedying conduct.

An unfair labor practice charge refers to a complaint that an employer or a union violated the NLRA. Remedies for an unfair labor practice charge vary depending on the circumstances and type of allegations, but can include such things as orders to cease conduct, reinstatement or back pay.

Under the final rule, the NLRB generally expects that it will be able to informally resolve any charge that an employer failed to post the required notice. In most cases, the NLRB expects that employers who fail to post the notice were unaware of the rule and will comply when requested by an NLRB agent. When a charge is filed, the Regional Director will investigate. If the allegations appear true, the Regional Director will make reasonable efforts to persuade the employer to post the required notice. If the employer does so, there will rarely be need for a further proceeding.

If the alleged violation cannot be resolved informally, a formal complaint may be issued by the NLRB. If the NLRB finds a failure to post at this stage, the employer can be ordered to post the required notice, as well as a remedial notice. Additional remedies may also be invoked pursuant to NLRB authority.

If an employer knowingly and willfully fails to post the notice, that failure may be considered evidence of unlawful motive in an unfair labor practice case involving other alleged violations of the NLRA.

Q: Do I have to maintain records or submit reports under this new rule?

A: No. The rule does not have any recordkeeping or reporting requirements. However, it is good practice to maintain records of each year's employment notices poster for four years to prove that you posted it (in the event of any agency investigation or audit).

Q: Am I allowed to place a “counter-poster” near the new NLRA required posting that discusses our company’s position on unions and our desire to remain union free?

A: Many companies have asked whether they can post what is often referred to as a “counter-poster” in response to the new “Employee Rights Under the NLRA” poster requirement. Employers have legitimate concerns about delivering their own message to employees on unionization. Companies understandably want to:

- Give their response to the message provided by the NLRA notice;
- Educate employees about the pros and cons of unionization; and
- Discuss the company’s desire to maintain direct employee-management relations without unionization.

The problem with counter-postings is that they may subject the company to an unfair labor practice charge unless they are carefully drafted. There is no “one-size-fits-all” counter-poster that would apply to all situations. Instead, companies interested in getting their own message out are advised to consult with competent labor counsel to determine the parameters of any such posting and to ensure that they do not run afoul of the NLRA.

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