NATIONAL LABOR RELATIONS BOARD

29 CFR Part 104

RIN 3142—AA07

Proposed Rules Governing Notification of Employee Rights Under the National Labor Relations Act

AGENCY: National Labor Relations Board.

ACTION: Notice of proposed rulemaking; request for comments.

SUMMARY: This Notice of Proposed Rulemaking (NPRM) proposes a regulation requiring employers, including labor organizations in their capacity as employers, subject to the National Labor Relations Act (NLRA) to post notices informing their employees of their rights as employees under the NLRA. The National Labor Relations Board (Board) believes that many employees protected by the NLRA are unaware of their rights under the statute. The intended effects of this action are to increase knowledge of the NLRA among employees, to better enable the exercise of rights under the statute, and to promote statutory compliance by employers and unions.

The proposed rule establishes the size, form, and content of the notice, and sets forth provisions regarding sanctions and remedies that may be imposed if an employer fails to comply with its obligations under the rule.

DATES: Comments regarding this proposed rule must be received by the Board on or before February 22, 2011. Any comments received after the comment period closes will be considered only to the extent feasible.

ADDRESSES: You may submit comments, identified by 3142–AA07, only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov.* To locate the proposed rule, search "documents open for comment" and use key words such as "National Labor Relations Board" or "Notification of Employee Rights under the National Labor Relations Act" to find documents accepting comments. Follow the instructions for submitting comments.

Delivery—Comments should be sent to: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW., Washington, DC 20570. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. The Board recommends that you confirm receipt of your delivered comments by contacting (202) 273–1067 (this is not a toll-free number). Individuals with hearing impairments may call 1–866–315–6572 (TTY/TDD).

Only comments submitted through *http://www.regulations.gov,* hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at *http://www.regulations.gov* and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post all comments received on *http://www.regulations.gov* without making any change to the comments, including any personal information provided. The *http://www.regulations.gov* Web site is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board cautions commenters not to include their personal information such as Social Security numbers, personal addresses, telephone numbers, and e-mail addresses in their comments, as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW., Washington, DC 20570, (202) 273–1067 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION: The Proposed Rule is organized as follows:

I. Background—briefly describes the development of the Proposed Rule
II. Authority—cites the legal authority supporting the Proposed Rule
III. Overview of the Rule—outlines the proposed regulatory text
IV. Dissenting View of Member Brian E. Hayes
V. Regulatory Procedures—sets forth the applicable regulatory requirements and requests comments on specific issues

I. Background

The NLRA, enacted in 1935, is the Federal statute that regulates most private sector labor-management relations in the United States.[1] Section 7 of the NLRA, 29 U.S.C 157, guarantees that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities[.]

In Section 1, 29 U.S.C. 151, Congress explained why it was necessary for those rights to be protected:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce[.] * * *
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> Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.
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> It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Thus, Congress plainly stated that, in its judgment, protecting the rights of employees to form and join unions and to engage in collective bargaining would benefit not only the employees themselves, but the nation as a whole. The Board was established to ensure that employers and, later, unions respect the exercise of employees' rights under the NLRA.[2]

For employees to exercise their NLRA rights, however, they must know that

[1] Labor-management relations in the railroad and airline industries are governed by the Railway Labor Act, 45 U.S.C. 151 *et seq.*

[2] The original NLRA did not include restrictions on the actions of unions; those were added in the Labor-Management Relations (Taft-Hartley) Act of 1947, 29 U.S.C. 141 *et seq.,* Title I.

those rights exist. There is reason to think that most do not. As one commentator put it,

> American workers are largely ignorant of their rights under the NLRA, and this ignorance stands as an obstacle to the effective exercise of such rights. For example, during union organizing campaigns, employees' ignorance of the law hinders their ability to assess employer anti-union propaganda, thus diluting their right to organize. In the non-union setting, employees' ignorance leads to the underutilization of legitimate workplace protests, of the voicing of group grievances, and of requests for outside help from government agencies or other third parties. In sum, lack of notice of their rights disempowers employees.

Peter D. DeChiara, "*The Right to Know: An Argument for Informing Employees of Their Rights under the National Labor Relations Act,*" 32 Harv. J. on Legis. 431, 433–434 (1995) (footnotes omitted).[3]

There are any number of reasons why such a knowledge gap could exist. The overwhelming majority of private sector employees are not represented by unions, and thus lack an important source of information about NLRA rights.[4] Immigrants, who comprise an increasing proportion of the nation's work force, are unlikely to be familiar with their workplace rights, including their rights under the NLRA. Several studies have suggested that high school students, many of whom are about to enter the labor force, are uninformed about labor law and labor relations. *See* DeChiara, above, at 436 and fn. 28 (citing studies).

If employees are largely unaware of their NLRA rights, however, one reason surely is that, except in very limited circumstances, no one is required to inform them of those rights.[5] The NLRA is almost unique among major Federal labor laws in not including an express statutory provision requiring employers routinely to post notices at their workplaces informing employees of their statutory rights. Such postings are required under the Fair Labor Standards Act,[6] Title VII of the Civil Rights Act of 1964,[7] the Age Discrimination in Employment Act,[8] the Occupational Safety and Health Act,[9] the Americans with Disabilities Act,[10] the Family Medical Leave Act,[11] the Uniformed Service Employment and Reemployment Rights Act,[12] the Railway Labor Act,[13] the Employee Polygraph Protection Act,[14] the Migrant and Seasonal Agricultural Workers Protection Act,[15] and other Federal statutes.

Thus, the NLRA stands out as an exception to the widespread notice-posting practice that has long been common in the workplace, even though it is the basic Federal labor law protecting private-sector employees who act together to address terms and conditions of employment. "This absence of a general notice requirement under the NLRA is remarkable given the significance of the Act as the cornerstone of private-sector labor law in this country." *See* DeChiara, "*The Right to Know,*" above at 433.

Several efforts have been made to address this anomaly. In 1993, Charles J. Morris [16] petitioned the Board to issue a broad rule requiring employers and unions to post notices advising employees of their rights and duties under the NLRA and of addresses and telephone numbers where employees can contact the Board for information and assistance. In 1998, then-California Governor Pete Wilson petitioned the Board to require employers to inform employees, by either mailed or posted notices, of the rights of nonmembers under *Communications Workers* v. *Beck.*[17] Most recently, on January 30, 2009, President Obama issued Executive Order 13496, requiring Federal contractors and subcontractors to include in their Government contracts specific provisions requiring them to post notices of employees' NLRA rights. On May 20, 2010, the Department of Labor issued a Final Rule implementing the order effective June 21, 2010. 75 FR 28368, 29 CFR part 471. Both of the petitions and President Obama's order stressed the need for employees to be informed of their NLRA rights.

After due consideration, the Board now proposes to require that employees of all employers subject to the NLRA be informed of their NLRA rights, as they are of other rights at the workplace. Informing employees of their statutory rights is central to advancing the NLRA's promise of "full freedom of association, self-organization, and designation of representatives of their own choosing." NLRA Section 1, 29 U.S.C. 151. It is fundamental to employees' exercise of their rights that the employees know both their basic rights and where they can go to seek help in understanding those rights. Notice of the right of self-organization, to form, join, or assist labor organizations, to bargain collectively, to engage in other concerted activities, and to refrain from such activities, and information pertaining to the Board's role in protecting statutory rights serves the public interest.

The workplace itself is the most appropriate place for communicating with employees about their basic statutory rights as employees. *See Eastex, Inc* v. *NLRB,* 437 U.S. 556, 574 (1978). Workplace posting informs

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[3] *See also* Charles J. Morris, "*Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board,*" 23 Stetson L. Rev. 101, 107 (1993) ("Most American employees either have never heard of the NLRB or they do not know what it does, and very few know how to initiate Board action."); Morris, "*NLRB Protection in the Nonunion Workplace: A Glimpse at a General Theory of Section 7 Conduct,* 137 U. Pa. L. Rev. 1673, 1675–1676 (1989) (commenting on the widespread ignorance of NLRA rights on the part of nonunion employees).

[4] In 2009, only 8 percent of non-agricultural private sector employees were represented by unions. U.S. Department of Labor, Bureau of Labor Statistics, News Release USDL–10–0069, Table 3 (January 22, 2010). *Source:* Department of Commerce, Bureau of the Census, Current Population Survey.

[5] The Board requires that employees be notified of their NLRA rights in only the following narrow circumstances: (1) For the three working days before a Board-conducted representation election, the employer is required to post a notice of election including a brief description of employee rights; *see* 29 CFR 103.20. (2) When an employer or a union has been found to have violated employee rights under the NLRA, it is required to post a notice containing a brief summary of those rights. (3) Before a union may seek to obligate newly hired nonmember employees to pay dues and fees under a union-security clause, it must inform them of their right under *NLRB* v. *General Motors,* 373 U.S. 734 (1963), and *Communications Workers* v. *Beck,* 487 U.S. 735 (1988), to be or remain nonmembers and that nonmembers have the right to object to paying for union activities unrelated to the union's duties as the bargaining representative and to obtain a reduction in dues and fees for such activities. *California Saw & Knife Works,* 320 NLRB 224, 233 (1995), enfd. sub nom. *Machinists* v. *NLRB,* 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Strang* v. *NLRB,* 525 U.S. 813 (1998). The same notice must also be given to union members if they did not receive it when they entered the bargaining unit. *Paperworkers Local 1033 (Weyerhaeuser Paper Co.),* 320 NLRB 349, 350 (1995), rev'd. on other grounds sub nom. *Buzenius* v. *NLRB,* 124 F.3d 788 (6th Cir. 1997), vacated sub nom. *United Paperworkers Intern. Union* v. *Buzenius,* 525 U.S. 979 (1998).

[6] 29 U.S.C. 211 (implementing regulation 29 CFR 516.4).

[7] 42 U.S.C. 2000e–10(a).

[8] 29 U.S.C. 627.

[9] 29 U.S.C. 651, 657(c).

[10] 42 U.S.C. 12101, 12115.

[11] 29 U.S.C. 2601, 2619(a).

[12] 38 U.S.C. 4334.

[13] 45 U.S.C. 152, Eighth.

[14] 29 U.S.C. 2003.

[15] 29 U.S.C. 1821

[16] Professor Emeritus of Law, Southern Methodist University.

[17] *See* fn. 5 above. In 1992, President George H.W. Bush issued Executive Order 12800, requiring unionized Federal contractors to post notices informing employees of their rights under *General Motors* and *Beck.* In 1993, President Clinton revoked that order. *See* E.O.12836. In 2001 President George W. Bush issued Executive Order 13201 containing requirements similar to those in Executive Order 12800. On January 30, 2009, President Obama revoked that order. See E.O. 13496, Section 13.

employers, as well as employees, of the employees' rights. Thus, some employers may be less likely to violate their employees' NLRA rights once they know what those rights are; others may be dissuaded from violations by the knowledge that employees know their rights and may be less likely to acquiesce if their rights are violated. In any event, it seems plausible that "employees who see the notice, instead of quitting or suffering in silence, would be more likely to exercise their right to act together to improve conditions such as low pay, undesirable work schedules, or uncomfortable or dangerous conditions in the workplace." DeChiara, *The Right to Know,* above, at 462 (footnotes omitted). Indeed, as the New York Times reported with respect to a successful Supreme Court litigant:

> One thing that inspired Ms. White in her struggle, curiously, was the bland, government-mandated flier posted by every employer, the one that promises a workplace free of discrimination on the basis of race, creed or sex. "I can always visualize that," she said. "But I never thought it would happen to me."

Shaila Dewan, *Forklift Driver's Stand Leads to Broad Rule Protecting Workers Who Fear Retaliation,* New York Times (June 24, 2006) (quoting plaintiff in *Burlington Northern & Santa Fe Ry.* v. *White,* 548 U.S. 53 (2006)).

For the foregoing reasons, the Board proposes a new rule requiring all employers subject to the NLRA to post a copy of a notice advising employees of their rights under the NLRA and providing information pertaining to the enforcement of those rights. As explained below, the burden of compliance will be minimal—the notices will be made available by the Board (both electronically and in hard copy), and employers need only post the notices in places where they customarily post notices to employees; there are no reporting or recordkeeping requirements.

II. Authority

Section 6 of the NLRA, 29 U.S.C. 156, provides that "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act [5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act." The Board interprets Section 6 as authorizing the proposed rule, and specifically invites comments on this issue.

III. Overview of the Rule

If adopted, the Board's proposed rule, which requires employers subject to the NLRA to post notices of employee rights under the NLRA, will be set forth in Chapter 1, Part 104 of Volume 29 of the Code of Federal Regulations (CFR). Subpart A of the proposed rule sets out definitions; prescribes the size, form, and content of the employee notice; and lists the categories of employers that are not covered by the proposed rule. Subpart B sets out standards and procedures related to allegations of noncompliance and enforcement of the proposed rule. The discussion below is organized in the same manner and explains the Board's reasoning in adopting the standards and procedures contained in the regulatory text, which follows. The Board invites comments on any issues addressed by the proposals in this rulemaking.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions From Coverage Definitions

For the most part, the definitions proposed in this rule are taken from those appearing in Section 2 of the NLRA, 29 U.S.C. 152. The Board invites comments regarding the definitions proposed in § 104.201 below.

Requirements for Employee Notice

Content requirements. The proposed notice contains a summary of employee rights established under the NLRA. The Board believes that requiring notice of employee rights effectuates the purposes of the NLRA. Section 104.202 of the proposed rule requires employers subject to the NLRA to post and maintain the notice in conspicuous places, including all places where notices to employees are customarily posted, and to take reasonable steps to ensure that the notices are not altered, defaced, or covered by any other material.

In arriving at the content of the notice of employee rights, the Board is proposing to adopt the language of the Department of Labor's final rule requiring Federal contractors to post notices of employees' NLRA rights. 29 CFR part 471. The Board tentatively agrees with the Department of Labor that neither quoting the statement of employee rights contained in Section 7 of the NLRA nor briefly summarizing those rights in the notice would be likely to effectively inform employees of their rights.[18] Rather, the language of the notice should include a more detailed description of employee rights derived from Board and court decisions implementing those rights.[19] The Board also sees merit in the Department of Labor's judgment that including in the notice examples, again derived from Board and court decisions, of conduct that violates the NLRA will assist employees in understanding their rights. The Board has carefully reviewed the content of the notice required under the Department of Labor's final rule, which was modified in response to comments from numerous sources,[20] and has tentatively concluded that that notice explains employee rights accurately and effectively without going into excessive or confusing detail. The Board therefore finds it unnecessary, for purposes of this proposed rulemaking, to modify the language of the notice in the Department of Labor's final rule. Because the notice of employee rights would be the same under the Board's proposed rule as under the Department of Labor's rule, Federal contractors that have posted the Department of Labor's required notice would have complied with the Board's rule and, so long as that notice is posted, would not have to post a second notice.

The Board also tentatively agrees with the Department of Labor that it is unnecessary for the notice to include specifically the right of employees who are not union members and who are covered by a contractual union-security clause to refuse to pay union dues and fees for any purpose other than collective bargaining, contract administration, or grievance adjustment. *See Communications Workers* v. *Beck,* 487 U.S. 735 (1988).[21] In the relatively small number of workplaces where union-security provisions exist, unions that seek to obligate employees to pay dues and fees under those provisions are already required to inform those employees of their *Beck* rights. *See* footnote 5 above. In other words, existing law already requires notice of this particular set of rights to all

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[18] Section 7 of the NLRA states, very generally, that

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining of other mutual aid or protection, and shall also have the right to refrain from any or all such activities[.]

29 U.S.C. 157.

[19] The pre-election notices and remedial notices that the Board requires to be posted in other contexts contain only summary descriptions of employee rights. In the pre-election context, however, at least one union is on the scene and presumably will enlighten employees about their NLRA rights to some extent. And the purpose of remedial notices is chiefly to inform employees of what employers and/or unions have done to violate their NLRA rights, and less to inform them of their rights in general.

[20] *See* 75 FR 28372–28381.

[21] This issue is the subject of the petition filed by former Governor Pete Wilson; see earlier discussion, above.

employees who may exercise them. Moreover, there are too few employees who might benefit from such specific notice of this one set of rights to warrant its inclusion in the general notice. Only about 8 percent of all private sector employees are currently represented by unions,[22] and by no means are all of them subject to union-security clauses. Indeed, in the 22 so-called "right to work" states that prohibit union-security arrangements, *no* employees are covered by union-security clauses. Because *Beck* does not even apply to the overwhelming majority of employees in today's private sector workplace, and because unions already are obliged to inform the employees to whom it does apply of their *Beck* rights, the Board does not propose to include this notification in the notice of employee rights.

The Board invites comment on all of the issues raised by the statement of NLRA rights proposed for inclusion in the required notice to employees. In particular, the Board requests comments on whether the notice contains sufficient information about employee rights, whether it effectively conveys that information to employees, and whether it achieves the desired balance between providing an overview of employee rights and limiting unnecessary and distracting information.

The proposed Appendix to Subpart A includes Board contact information and basic enforcement procedures to enable employees to learn more about their NLRA rights and how to enforce them. Thus, the required notice confirms that unlawful conduct will not be permitted, provides information about the Board and about filing a charge with the Board, and states that the Board will prosecute violators of the NLRA. The notice also indicates that there is a 6-month statute of limitations for filing charges with the Board alleging violations and provides Board contact information. The Board invites suggested additions or deletions to these provisions that would improve the content of the notice of employee rights.

Size and form requirements. The Board proposes that the notice to employees shall be at least 11 inches by 17 inches in size, and in such colors and type size and style as the Board shall prescribe. Employers that choose to print the notice after downloading it from the Board's Web site must print in color, and the printed notice shall be at least 11 inches by 17 inches in size.

Posting requirements. Proposed § 104.202(d) requires all covered employers to post the employee notice physically "in conspicuous places, including all places where notices to employees are customarily posted." Employers must take steps to ensure that the notice is not altered, defaced, or covered with other material. Proposed § 104.202(e) states that the Board will print the notice poster and provide copies to employers on request. It also states that employers may download copies of the poster from the Board's Web site, *www.nlrb.gov,* for their use. It further provides that employers may reproduce exact duplicates of the poster supplied by the Board, and that they may also use commercial poster services to provide the employee notice consolidated onto one poster with other Federally mandated labor and employment notices, as long as consolidation does not alter the size, color, or content of the poster provided by the Board. Finally, employers that have significant numbers of employees who are not proficient in English will be required to post notices of employee rights in the language or languages spoken by significant numbers of those employees. The Board will make available posters containing the necessary translations.

In addition to requiring physical posting of paper notices, proposed § 104.202(f) requires that notices be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the employer customarily communicates with its employees by such means.[23] An employer that customarily posts notices to its employees on an intranet or internet site must display the required employee notice on such a site prominently—i.e., no less prominently than other notices to employees. The Board proposes to give employers two options to satisfy this requirement. An employer may either download the notice itself and post it in the manner described above, or post, in the same manner, a link to the Board's Web site that contains the full text of the required employee notice. In the latter case, the link must contain the prescribed introductory language from the poster, which appears in proposed Appendix to Subpart A, below. An employer that customarily communicates with its employees by e-mail will satisfy the electronic posting requirement by sending its employees an e-mail message containing the link described above.

Where a significant number of an employer's employees are not proficient in English, the employer must provide the required electronic notice in the language the employees speak. This requirement can be met either by downloading and posting, as required in § 104.202(f), the translated version of the notice supplied by the Board, or by prominently displaying, as required in § 104.202(f), a link to the Board's Web site that contains the full text of the poster in the language the employees speak. The Board will provide translations of that link.

The Board seeks comments on its proposed requirements for both physical and electronic notice posting. In addition, the Board solicits comments on whether it should prescribe standards regarding the size, clarity, location, and brightness of the electronic link, including how to prescribe electronic postings that are at least as large, clear, and conspicuous as the employer's other postings.

Exceptions. The proposed rule applies only to employers that are subject to the NLRA. Under NLRA Section 2(2), "employer" excludes the United States government, any wholly owned government corporation, any Federal Reserve Bank, any State or political subdivision, and any person subject to the Railway Labor Act, 45 U.S.C. 151 *et seq*. 29 U.S.C. 152(2). Thus, under the proposed rule, those excluded entities are not required to post the notice of employee rights. The proposed rule also does not apply to entities that employ only individuals who are not considered "employees" under the NLRA. *See* Subpart A, below; 29 U.S.C. 152(3). Finally, the proposed rule does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.[24]

Subpart B—Enforcement and Complaint Procedures

Subpart B of the proposed rule contains procedures for enforcement of the employee notice-posting requirement and sanctions for noncompliance. In crafting Subpart B, the Board was mindful of the need to identify effective incentives for compliance. The Board gave careful consideration to several alternative approaches to achieving the highest degree of compliance with the rule's

[22] *See* fn. 4, above.

[23] *See J. Picini Flooring,* 356 NLRB No. 9, slip op. at 6 (2010).

[24] The proposed rule excludes small businesses whose impact on interstate commerce is de minimis or so slight that they do not meet the Board's discretionary jurisdiction requirements. *See* generally An Outline of Law and Procedure in Representation Cases, Chapter 1, found on the Board's Web site, *http://www.nlrb.gov,* and cases cited therein.

notice-posting requirements. Those alternatives, not all of which are mutually exclusive, are (1) finding the failure to post the required notices to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices; (3) considering the willful failure to post the notices as evidence of unlawful motive in unfair labor practice cases; (4) voluntary compliance.

The Board has considered but tentatively rejected relying solely on voluntary compliance. This option logically would appear to be the least likely to be effective, and the Board's limited experience with voluntary posting of notices of employee rights seems to confirm this. When an election petition is filed, the Board's Regional Office sends the employer Form NLRB–5492, Notice to Employees, together with a leaflet containing significant "Rights of Employees." *See* the Board's Casehandling Manual, Part Two—Representation Proceedings, Section 11008.5, found on the Board's Web site, *http://www.nlrb.gov.* The Regional Office also asks employers to post the notice of employee rights in the workplace; however, the Board's experience suggests that the notices are seldom posted. Therefore, the Board does not propose to rely on voluntary compliance alone; but voluntary compliance, in combination with either tolling the statute of limitations or finding a knowing failure to post employee notices to be evidence of unlawful motive, or both, may be a workable approach. (The Board did not consider imposing monetary fines for noncompliance, because the Board lacks the statutory authority to impose punitive remedies. *See, e.g., Republic Steel Corp.* v. *NLRB,* 311 U.S. 7, 10–12 (1940).)

Accordingly, the Board proposes the following sanctions for failure or refusal to post the required employee notices: (1) Finding the failure to post the required notices to be an unfair labor practice; (2) tolling the statute of limitations for filing unfair labor practice charges against employers that fail to post the notices; and (3) considering the knowing failure to post the notices as evidence of unlawful motive in unfair labor practice cases. The Board invites comments on any of the enforcement and procedural matters proposed in Subpart B.

Noncompliance as an unfair labor practice. The proposed rule requires employers to inform employees of their NLRA rights because the Board believes that employees must know their rights in order to exercise them effectively. Accordingly, the Board proposes to find that an employer that fails or refuses to post the required notice of employee rights violates Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1) by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in Section 7 (29 U.S.C. 157)."

The Board expects that most employers that fail to post the required notice will do so simply because they are unaware of the rule, and that when it is called to their attention, they will comply without the need for formal administrative action or litigation. When that is not the case, the Board's customary procedures for investigating and adjudicating alleged unfair labor practices may be invoked. *See* NLRA Sections 10 and 11, 29 U.S.C. 160, 161; 29 CFR part 102, subpart B.[25] When the Board finds a violation, it will customarily order the employer to cease and desist and to post the notice of employee rights as well as a remedial notice.

Consistent with precedent, it will be unlawful for an employer to threaten or retaliate against an employee for filing charges or testifying in a Board proceeding involving an alleged violation of the notice-posting requirement. NLRA Sections 8(a)(1), 8(a)(4), 29 U.S.C. 158(a)(1), (4); *Romar Refuse Removal,* 314 NLRB 658 (1994).

The Board also proposes the following options intended to induce compliance with the notice-posting requirement, either in addition to or instead of finding the failure to post to be an unfair labor practice:

Tolling statute of limitations. Failure to post the notice of employee rights may warrant tolling the 6-month statute of limitations for filing unfair labor practice charges. NLRA Section 10(b) provides in part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board[.]" 29 U.S.C. 160(b). However, the 6-month period does not begin to run until the charging party has actual or constructive notice of the allegedly unlawful conduct. *See, e.g., John Morrell & Co.,* 304 NLRB 896, 899 (1991), review denied 998 F.2d 7 (DC Cir. 1993) (table).

The same should be true when an employee, although aware of the conduct in question, is excusably unaware that the conduct is unlawful. As the U.S. Court of Appeals for the Third Circuit has observed in another context, "The [ADEA] posting requirement was undoubtedly created because Congress recognized that the very persons protected by the Act might be unaware of its existence." *Bonham* v. *Dresser Industries,* 569 F.2d 187, 193 (1977), cert. denied 439 U.S. 821 (1978). Because notices of employee rights are intended, in part, to advise employees of the kinds of conduct that may violate their rights, courts have repeatedly found in cases arising under other Federal employment laws that the statutes of limitation for filing actions should be tolled when employers fail to post required notices informing employees of their rights, unless the employee has obtained knowledge of those rights or is represented by counsel. *See, e.g., Mercado* v. *Ritz-Carlton San Juan Hotel,* 410 F.3d 41, 47–48, 95 FEP Cases 1464 (1st Cir. 2005) (Title VII); *EEOC* v. *Kentucky State Police Dept.,* 80 F.3d 1086, 1096 (6th Cir. 1996), cert. denied 519 U.S. 963 (1996); *Bonham,* above, 569 F.2d at 93 (ADEA); *Hammer* v. *Cardio Medical Products, Inc.,* 131 Fed. Appx. 829, 831–832 (3d Cir. 2005) (Title VII and ADEA); *Henchy* v. *City of Absecon,* 148 F. Supp. 2d 435, 439 (D. N.J. 2001); *Kamens* v. *Summit Stainless, Inc.,* 586 F. Supp. 324, 328 (E.D. Pa. 1984) (FLSA). (But *see Wilkerson* v. *Siegfried Ins. Agency, Inc.,* 683 F.2d 344, 347 (10th Cir. 1982) ("the simple failure to post [Title VII and ADEA] notices, without intent to actively mislead the plaintiff respecting the cause of action, does not extend the time within which a claimant must file his or her discrimination charge.")) The same reasoning would appear applicable to unfair labor practice allegations under the NLRA. Accordingly, if an employer fails to post the required notice of employee rights, the Board may find that the 6-month period for filing charges does not begin to run until the notice is posted or the employee filing the charge otherwise acquires actual or constructive notice that the conduct in question may be unlawful. The Board invites comments as to whether unions filing charges should be deemed to have constructive knowledge of illegality.

Knowing noncompliance as evidence of unlawful motive. An employer that is aware, or should be aware, of the requirement to post the notice of employee rights and fails to do so is knowingly preventing employees from learning of their NLRA rights. Therefore, when it is adjudicating cases in which unlawful motive is an element of one or more alleged violations, the Board may

[25] The Board's General Counsel has unreviewable discretion as to whether to issue a complaint in an unfair labor practice proceeding. This discretion includes dismissing any charge filed against an employer who is not covered by the Board's jurisdictional requirements.

consider knowing noncompliance with the posting requirement in determining whether unlawful motive has been established.

Subpart C—Ancillary Matters

Several technical issues unrelated to those discussed in the two previous subparts are set out in this subpart.

IV. Dissenting View of Member Brian E. Hayes

A majority of the current Board had decided to grant the rule-making petitions herein prior to my confirmation as a Board Member. As a consequence of this timing I did not participate in the decision to grant the instant petitions, nor did I participate in the drafting of the proposed rule. Had I done so, my decision would have been to deny the instant petitions as I believe the Board lacks the statutory authority to promulgate or enforce the type of rule which the petitions contemplated and which the proposed rule makes explicit. Accordingly, I dissent from the Board's actions today.

The instant proposed rule would impose a requirement that all employers subject to the Board's jurisdiction post a notice of employees' rights identical to that which the Department of Labor, acting pursuant to clear authority under an Executive Order, has recently required federal contractors to post. Going well beyond that requirement, however, the proposed rule here would further impose unfair labor practice liability for any failure to post a notice and would also suspend the Section 10(b) limitations period for any unfair labor practice charge against a noncompliant employer.

Public comment is invited on all aspects of the proposed rule and its proposed enforcement. I believe such comment is plainly warranted and should address the Board's authority to impose or enforce such a rule. In my view, it is essential to have a broader basis for enacting such a rule than the opinions of my colleagues and the treatises of the party requesting rulemaking, Professor Charles Morris.

My colleagues acknowledge that the Act differs from several more recent statutes that expressly require the posting of individual rights notices. The absence of such express language in our Act is a strong indicator, if not dispositive, that the Board lacks the authority to impose such a requirement. In particular, I do not believe that the language of Section 6 of the Act is sufficient statutory authority for imposing such a notice requirement and sanctions for noncompliance. To the contrary, Section 10 of the Act indicates to me that the Board clearly lacks the authority to order affirmative notice-posting action in the absence of an unfair labor practice charge filed by an outside party. For that reason, without regard for whether a notice-posting requirement would further the purposes of the Act if the Board had the authority to impose it, I would have denied the petitions for rulemaking.

Brian E. Hayes, Member

V. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 ("RFA"), 5 U.S.C. 601 *et seq.,* requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies "review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]." E.O. 13272, Sec. 1, 67 FR 53461 ("Proper Consideration of Small Entities in Agency Rulemaking"). However, an agency is not required to prepare an initial regulatory flexibility analysis for a proposed rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C 605(b). Based on the analysis below, in which the Board has estimated the financial burdens to employers subject to the NLRA associated with complying with the requirements contained in this final rule, the Board has certified to the Chief Counsel for Advocacy of the Small Business Administration ("SBA") that this rule will not have a significant economic impact on a substantial number of small entities.

The primary goal of the proposed rule is the notification to employees of their rights with respect to collective bargaining and other concerted activities protected by Section 7 of the NLRA. This goal is achieved through the posting of notices by employers subject to the NLRA of the rights of employees under the NLRA. The Board will make the notices available at no cost to employers; there are no information collection or reporting requirements.

The Board estimates that in order to comply with this rule, each employer subject to the NLRA will spend a total of 2 hours during the first year in which the rule is in effect. This includes 30 minutes for the employer to learn where and how to post the required notices, 30 minutes to acquire the notices from the Board or its Web site, and 60 minutes to post them physically and electronically, depending on where and how the employer customarily posts notices to employees. The Board assumes that these activities will be performed by a professional or business worker, who, according to Bureau of Labor Statistics data, earned a total hourly wage of $31.02 in January 2009, including fringe benefits. The Board then multiplied this figure by 2 hours to estimate the average costs for employers to comply with this rule during the first year in which the rule is in effect. Accordingly, this rule is estimated to impose average costs of $62.04 per employer subject to the NLRA (2 hours × $31.02) during the first year. These costs will decrease dramatically in subsequent years because the only employers affected will be those that have did not previously satisfy their posting requirements or that have since expanded their facilities or established new ones.

According to the United States Census Bureau, there were approximately 6 million businesses with employees in 2007. Of those, the SBA estimates that all but about 18,300 were small businesses with fewer than 500 employees.[26] This rule does not apply to employers who do not meet the Board's jurisdictional requirements, but the Board does not have the means to calculate the number of small businesses within the Board's jurisdiction. Accordingly, the Board assumes for purposes of this analysis that the great majority of the nearly 6 million small businesses will be affected.

Based on the foregoing, the Board concludes that that the proposed rule will not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act does not define either "significant economic impact" or "substantial" as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, "what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact." *See A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act,* Office of Advocacy, U.S. Small Business Administration at 17 (available at *http://*

[26] *Source:* SBA Office of Advocacy estimates based on data from the U.S. Department of Commerce, Bureau of the Census, and trends from the U.S. Department of Labor, Bureau of Labor Statistics, Business Employment Dynamics.

www.sba.gov) ("SBA Guide"). As to economic impact, one important indicator is the cost of compliance in relation to revenue of the entity or the percentage of profits affected. SBA Guide, above, at 17. Here, the Board has determined that the average cost of complying with the notice-posting rule in the first year for all employers subject to the NLRA will be $62.04. The Board concludes that this economic impact on small employers is not significant.[27] The Board assumes that the number of small employers that will be affected by the proposed rule is a substantial number within the meaning of 5 U.S.C. 601. However, because the economic impact on those employers is minimal, the Board concludes that, under 5 U.S.C. 605, the proposed rule will not have a significant economic impact on any small employers.

As stated above, the Board assumes that a substantial number of small businesses will be required to comply with this proposed rule. The Board has preliminarily considered and rejected alternatives that would minimize the impact of the proposed rule, including a tiered approach for small entities with only a few employees, concluding that a tiered approach or an exemption for some small entities would substantially undermine the purpose of the proposed rule because so many employers would be exempt under the SBA definitions. Given the very small estimated cost of compliance, it is possible that the burden on a small business of determining whether it fell into a particular tier might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit coverage of any part of the Act to only larger employers. The Board also believes that employees of small employers may well be those workers most in need of a Board notice. Finally, the Board's jurisdictional standards mean that very small employers will not be covered by the proposed rule in any case. A summary of the Board's discretionary jurisdictional standards appears in § 104.204, below.

The Board invites the public to comment on the above certification.

Paperwork Reduction Act (PRA)[28]

The proposed rule imposes certain minimal burdens associated with the posting of the employee notice required by § 104.202. As noted in § 104.202(e), the Board will make the notice available, and employers will be permitted to post exact duplicate copies of the notice. Under the regulations implementing the PRA, "[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public" is not considered a "collection of information" under the Act. *See* 5 CFR 1320.3(c)(2). Therefore, the posting requirement is not subject to the PRA.

The PRA does not cover the costs to the Federal government of administering the regulations established by the proposed rule. The regulations implementing the PRA define "burden," in pertinent part, as "the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency." 5 CFR 1320.3(b)(1). The definition of "person" in the same regulations includes "an individual, partnership, association, corporation (including operations of government-owned contractor-operated facilities), business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision." 5 CFR 1320.3(k). It does not include the Federal government or any branch, political subdivision, or employee thereof. Therefore, the cost to the Federal government of administering the proposed rule need not be considered.

Accordingly, this rule does not contain information collection requirements that require approval by the Office of Management and Budget under the PRA (44 U.S.C. 3507 *et seq.*). The Board invites the public to comment on whether the proposed rule otherwise implicates the PRA.

Request for Comments

The Board invites comments about the NPRM from interested parties, including, employers, employees, employer organizations, unions, public interest groups, and the public. Only comments submitted through *http://www.regulations.gov*, hand delivered, or mailed will be accepted. These methods for submitting comments are intended to be exclusive. Any ex parte communications received by the Board will be added to the public rulemaking record.

List of Subjects in 29 CFR Part 104

Administrative practice and procedure, Employee rights, Labor unions.

Text of Proposed Rule

A new part 104 is proposed to be added to 29 CFR chapter I to read as follows:

PART 104—NOTIFICATION OF EMPLOYEE RIGHTS; OBLIGATIONS OF EMPLOYERS

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Sec.

104.201 What definitions apply to this part?
104.202 What employee notice must employers subject to the NLRA post in the workplace?
104.203 Are Federal contractors covered under this part?
104.204 What entities are not subject to this part?

Appendix to Subpart A—Text of Employee Notice

Subpart B—General Enforcement and Complaint Procedures

104.210 How will the Board determine whether an employer is in compliance with this part?
104.211 What are the procedures for filing a charge?
104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?
104.213 What sanctions can be imposed for failure to post the employee notice?
104.214 What other sanctions may be imposed for noncompliance?

Subpart C—Ancillary Matters

104.220 What other provisions apply to this part?

Authority: National Labor Relations Act (NLRA), Section 6, 29 U.S.C. 156; Administrative Procedure Act, 5 U.S.C. 553.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

§ 104.201 What definitions apply to this part?

Employee includes any employee, and is not limited to the employees of a particular employer, unless the NLRA explicitly states otherwise. The term includes anyone whose work has ceased because of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment. However, it does not include agricultural laborers, supervisors, or independent contractors, or anyone employed in the domestic service of any

[27] In reaching this conclusion, the Board considered the likelihood that employers who might otherwise be significantly affected even by the low cost of compliance under this rule will not meet the Board's jurisdictional requirements. Thus, those employers will not be subject to this rule.

[28] 44 U.S.C. 3501 *et seq.*

family or person at his home, or by his parent or spouse, or by an employer subject to the Railway Labor Act (45 U.S.C. 151 *et seq.*), or by any other person who is not an employer as defined in the NLRA. 29 U.S.C. 152(3).

Employee notice means the notice set forth in the Appendix to Subpart A of this part that employers subject to the NLRA must post pursuant to this part.

Employer includes any person acting as an agent of an employer, directly or indirectly. The term does not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C. 152(2). Further, the term "employer" does not include entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

Labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. 29 U.S.C. 152(5).

National Labor Relations Board (Board) means the National Labor Relations Board provided for in section 3 of the National Labor Relations Act, 29 U.S.C. 153. 29 U.S.C. 152(10).

Person includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in cases under title 11 of the United States Code, or receivers. 29 U.S.C. 152(1).

Related rules, regulations, and orders, as used in § 104.202, means rules, regulations, and relevant orders issued by the Board pursuant to this part.

Supervisor means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment. 29 U.S.C. 152(11).

Unfair labor practice means any unfair labor practice listed in section 8 of the National Labor Relations Act, 29 U.S.C. 158. 29 U.S.C. 152(8).

Union means a labor organization as defined above.

§ 104.202 What employee notice must employers subject to the NLRA post in the workplace?

(a) *Posting of employee notice.* All employers subject to the NLRA must post notices to employees, in conspicuous places, informing them of their NLRA rights, together with Board contact information and information concerning basic enforcement procedures, in the language set forth in the Appendix to Subpart A of this part.

(b) *Size and form requirements.* The notice to employees shall be at least 11 inches by 17 inches in size, and in such colors and type size and style as the Board shall prescribe. Employers that choose to print the notice after downloading it from the Board's Web site must print in color, and the printed notice shall be at least 11 inches by 17 inches in size.

(c) *Adaptation of language.* The National Labor Relations Board may find that an Act of Congress, clarification of existing law by the courts or the Board, or other circumstances make modification of the employee notice necessary to achieve the purposes of this part. In such circumstances, the Board will promptly issue rules, regulations, or orders as are needed to ensure that all future employee notices contain appropriate language to achieve the purposes of this part.

(d) *Physical posting of employee notice.* The employee notice must be posted in conspicuous places, including all places where notices to employees are customarily posted. Where a significant portion of an employer's workforce is not proficient in English, the employer must provide the notice in the language employees speak. An employer must take reasonable steps to ensure that the notice is not altered, defaced, covered by any other material, or otherwise rendered unreadable.

(e) *Obtaining a poster with the employee notice.* A poster with the required employee notice, including a poster with the employee notice translated into languages other than English, will be printed by the Board, and may be obtained from the Board's office, 1099 14th Street, NW., Washington, DC 20570, or from any of the Board's regional, subregional, or resident offices. Addresses and telephone numbers of those offices may be found on the Board's Web site at *http://www.nlrb.gov.* A copy of the poster in English and in languages other than English may also be downloaded from the Board's Web site at *http://www.nlrb.gov*. Employers also may reproduce and use exact duplicate copies of the Board's official poster. In addition, employers may use commercial services to provide the employee notice poster consolidated onto one poster with other Federally mandated labor and employment notices, so long as the consolidation does not alter the size, color, or content of the poster provided by the Board.

(f) *Electronic posting of employee notice.* (1) In addition to posting the required notice physically, an employer must also distribute the required notice electronically, such as by e-mail, posting on an intranet or an internet site, and/or by any other electronic means, if the employer customarily communicates with its employees by such means. An employer that customarily posts notices to employees on an intranet or internet site will satisfy the electronic posting requirement by displaying prominently—i.e., no less prominently than other notices to employees—on such a site either an exact copy of the poster, downloaded from the Board's Web site, or a link to the Board's Web site that contains the poster. The link to the Board's Web site must read, "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers," and must contain the prescribed introductory language from the poster, which appears in the Appendix to Subpart A of this part. An employer that customarily communicates with its employees by e-mail will satisfy the electronic notice posting requirement by sending employees an e-mail message containing the link described above.

(2) Where a significant portion of an employer's workforce is not proficient in English, the employer must provide the notice required in paragraph (f)(1) of this section in the language the employees speak, in the manner set forth in that paragraph. The Board will provide translations of the link to the Board's Web site for any employer that wishes to display the link on its Web site.

104.203 Are Federal contractors covered under this part?

Yes, Federal contractors are covered. However, contractors may comply with the provisions of this part by posting the notices to employees required under the Department of Labor's notice-posting rule, 29 CFR Part 471.

§ 104.204 What entities are not subject to this part?

(a) The following entities are excluded from the definition of "employer" under the National Labor Relations Act and are not subject to the requirements of this part:

(1) The United States or any wholly owned Government corporation;

(2) Any Federal Reserve Bank;

(3) Any State or political subdivision thereof;

(4) Any person subject to the Railway Labor Act;

(5) Any labor organization (other than when acting as an employer); or

(6) Anyone acting in the capacity of officer or agent of such labor organization.

(b) In addition, employers employing exclusively workers who are excluded from the definition of "employee" under § 104.201 are not covered by the requirements of this part.

(c) This part does not apply to entities over which the Board has been found not to have jurisdiction, or over which the Board has chosen through regulation or adjudication not to assert jurisdiction.

(d)(1) Finally, this part does not apply to entities whose impact on interstate commerce, although more than de minimis, is so slight that they do not meet the Board's discretionary jurisdiction standards. The most commonly applicable standards are:

(i) The retail standard, which applies to employers in retail businesses, including home construction. The Board will take jurisdiction over any such employer that has a gross annual volume of business of $500,000 or more.

(ii) The nonretail standard, which applies to most other employers. It is based either 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"). The Board will take jurisdiction over any employer with an annual inflow or outflow of at least $50,000. Outflow can be either direct—to out-of-state purchasers—or indirect—to purchasers that meet other jurisdictional standards. Inflow can also be direct—purchased directly from out of state—or indirect—purchased from sellers within the state that purchased them from out-of-state sellers.

(2) There are other standards for miscellaneous categories of employers. These standards are based on the employer's gross annual volume of business unless stated otherwise. These standards are listed in the Table to this section.

TABLE TO § 104.204

Employer category	Jurisdictional standard
Amusement industry	$500,000.
Apartment houses, condominiums, cooperatives	$500,000.
Architects	Nonretail standard.
Art museums, cultural centers, libraries	$1 million.
Bandleaders	Retail/nonretail (depends on customer).
Cemeteries	$500,000.
Colleges, universities, other private schools	$1 million.
Communications (radio, TV, cable, telephone, telegraph)	$100,000.
Credit unions	Either retail or nonretail standard.
Day care centers	$250,000.
Gaming industry	$500,000.
Health care institutions:	
Nursing homes, visiting nurses associations	$100,000.
Hospitals, blood banks, other health care facilities (including doctors' and dentists' offices)	$250,000.
Hotels and motels	$500,000.
Instrumentalities of interstate commerce	$50,000.
Labor organizations (as employers)	Nonretail standard.
Law firms; legal service organizations	$250,000.
Newspapers (with interstate contacts)	$200,000.
Nonprofit charitable institutions	Depends on the entity's substantive purpose.
Office buildings; shopping centers	$100,000.
Private clubs	$500,000.
Public utilities	$250,000 or nonretail standard.
Restaurants	$500,000.
Social services organizations	$250,000.
Symphony orchestras	$1 million.
Taxicabs	$500,000.
Transit systems	$250,000.

(3) If an employer can be classified under more than one category, the Board will assert jurisdiction if the employer meets the jurisdictional standard of any of those categories.

(4) There are a few employer categories without specific jurisdictional standards:

(i) Enterprises whose operations have a substantial effect on national defense or that receive large amounts of Federal funds.

(ii) Enterprises in the District of Columbia.

(iii) Financial information organizations and accounting firms.

(iv) Professional sports.

(v) Stock brokerage firms.

(vi) U.S. Postal Service.

(5) A more complete discussion of the Board's jurisdictional standards may be found in *An Outline of Law and Procedure in Representation Cases,* Chapter 1, found on the Board's Web site, *www.nlrb.gov.*

Appendix to Subpart A—Text of Employee 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. 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 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 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 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 non-work 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 you that you will lose your job unless you support 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 other adverse action against you based on whether you have joined or 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.nlrb.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.

"* 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."

Subpart B—General Enforcement and Complaint Procedures

§ 104.210 How will the Board determine whether an employer is in compliance with this part?

Normally, the Board will determine whether an employer is in compliance when a person files an unfair labor practice charge alleging that the employer has failed to post the employee notice required under this part. Filing a charge sets in motion the Board's procedures for investigating and adjudicating alleged unfair labor practices, and for remedying conduct that the Board finds to be unlawful. *See* NLRA Section 10–11, 29 U.S.C. 160–61, and 29 CFR Part 102, Subpart B.

§ 104.211 What are the procedures for filing a charge?

(a) Filing charges. Any person (other than Board personnel) may file a charge with the Board alleging that an employer has failed to post the employee notice as required by this part. A charge should be filed with the Regional Director of the Region in which the alleged failure to post the required notice is occurring.

(b) Contents of charges. The charge must be in writing and signed, and must be sworn to before a Board agent, notary public, or other person authorized to administer oaths or take acknowledgements, or contain a declaration by the person signing it, under penalty of perjury, that its contents are true and correct. The charge must include:

(1) The charging party's full name and address;

(2) If the charge is filed by a union, the full name and address of any national or international union of which it is an affiliate or constituent unit;

(3) The full name and address of the employer alleged to have violated this part; and

(4) A clear and concise statement of the facts constituting the alleged unfair labor practice.

§ 104.212 What are the procedures to be followed when a charge is filed alleging that an employer has failed to post the required employee notice?

(a) When a charge is filed with the Board under this section, the Regional Director will investigate the allegations of the charge. If it appears that the allegations are true, the Regional Director will make reasonable efforts to persuade the respondent employer to post the required employee notice expeditiously. If the employer does so, the Board expects that there will rarely be a need for further administrative proceedings.

(b) If an alleged violation cannot be resolved informally, the Regional Director may issue a formal complaint against the respondent employer, alleging a violation of the notice-posting requirement and scheduling a hearing before an administrative law judge. After a complaint issues, the matter will be adjudicated in keeping with the Board's customary procedures. *See* NLRA Sections 10 and 11, 29 U.S.C. 160, 161; 29 CFR Part 102, Subpart B.

§ 104.213 What sanctions can be imposed for failure to post the employee notice?

(a) If the Board finds that the respondent employer has failed to post the required employee notices as alleged, the respondent will be ordered

to cease and desist from the unlawful conduct and post the required employee notice, as well as a remedial notice. In some instances additional remedies may be appropriately invoked in keeping with the Board's remedial authority.

(b) Any employer that threatens or retaliates against an employee for filing charges or testifying at a hearing concerning alleged violations of the notice-posting requirement may be found to have committed an unfair labor practice. *See* NLRA Section 8(a)(1) and 8(a)(4), 29 U.S.C. 158(a)(1), (4).

§ 104.214 What other sanctions may be imposed for noncompliance?

(a) Tolling of statute of limitations. When an employee files an unfair labor practice charge, the Board may find it appropriate to excuse the employee from the requirement that charges be filed within six months after the occurrence of the allegedly unlawful conduct, if the employer has failed to post the required employee notice, unless the employee has received actual or constructive notice that the conduct complained of is unlawful. *See* NLRA Section 10(b), 29 U.S.C. 160(b).

(b) Knowing noncompliance as evidence of unlawful motive. If an employer has actual or constructive knowledge of the requirement to post the employee notice and fails or refuses to do so, the Board may consider such a willful refusal as evidence of unlawful motive in a case in which motive is an issue.

Subpart C—Ancillary Matters

§ 104.220 What other provisions apply to this part?

(a) The regulations in this part do not modify or affect the interpretation of any other NLRB regulations or policy.

(b)(1) This subpart does not impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart must be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This part creates no right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Signed in Washington, DC, December 16, 2010.

Wilma B. Liebman,

Chairman.

[FR Doc. 2010–32019 Filed 12–21–10; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 50 and 51

[EPA–HQ–OAR–2010–0891, FRL–9241–9]

RIN 2060–AQ65

Reasonable Further Progress Requirements for the 1997 8-Hour Ozone National Ambient Air Quality Standard

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rulemaking.

SUMMARY: The EPA is proposing to revise the Agency's earlier interpretation of its rule regarding requirements for Reasonable Further Progress (RFP) that allowed certain emissions reductions from outside the nonattainment area to be credited toward meeting the RFP requirements for the 1997 8-hour ozone national ambient air quality standards (NAAQS). Specifically, EPA is proposing that States may not take credit for emission reductions from outside the nonattainment area to meet the area's RFP obligations. EPA is also taking comment on whether it would be appropriate for States to rely on emission reductions credit from outside the nonattainment area for RFP obligations.

DATES: *Comments.* Comments must be received on or before February 7, 2011.

Public Hearings. If anyone contacts us requesting a public hearing on or before January 6, 2011, we will hold a public hearing. Please refer to **SUPPLEMENTARY INFORMATION** for additional information on the comment period and the public hearing.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2010–0891, by one of the following methods:

- *http://www.regulations.gov:* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epa.gov.*
- *Mail:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA–HQ–OAR–2010–0891, Environmental Protection Agency, 1301 Constitution Ave., NW., Washington, DC 20460. Mail Code: 2822T. Please include two copies if possible.
- *Hand Delivery:* Air and Radiation Docket and Information Center, Attention Docket ID No. EPA–HQ–OAR–2010–0891, Environmental Protection Agency in the EPA Headquarters Library, Room Number 3334 in the EPA West Building, located at 1301 Constitution Ave., NW., Washington, DC. The EPA/DC Public Reading Room hours of operation will be 8:30 a.m. to 4:30 p.m. Eastern Standard Time (EST), Monday through Friday, Air and Radiation Docket and Information Center.

Instructions: Direct your comments to Docket ID No. EPA–HQ–OAR–2010–0891. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov*, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional information about EPA's public docket, visit the EPA Docket Center homepage at *http://www.epa.gov/epahome/dockets.htm.* For additional instructions on submitting comments, go to the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in *http://www.regulations.gov.* Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as