

which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data is readily available. The term "acute care hospital" shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.

(3) *Psychiatric hospital* is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).

(4) The term *rehabilitation hospital* includes and is limited to all hospitals accredited as such by either Joint Committee on Accreditation of Healthcare Organizations or by Commission for Accreditation of Rehabilitation Facilities.

(5) A *non-conforming unit* is defined as a unit other than those described in paragraphs (a) (1) through (8) of this section or a combination among those eight units.

(g) Appropriate units in all other health care facilities: The Board will determine appropriate units in other health care facilities, as defined in section 2(14) of the National Labor Relations Act, as amended, by adjudication.

[54 FR 16347, Apr. 21, 1989]

Subpart E [Reserved]

Subpart F—Remedial Orders

§ 103.100 Offers of reinstatement to employees in Armed Forces.

When an employer is required by a Board remedial order to offer an employee employment, reemployment, or reinstatement, or to notify an employee of his or her entitlement to reinstatement upon application, the employer shall, if the employee is serving in the Armed Forces of the United States at the time such offer or notification is made, also notify the employee of his or her right to reinstatement upon application in accordance with the Military Selective Service Act of 1967, as amended, after discharge from the Armed Forces.

[37 FR 21939, Oct. 17, 1972, as amended at 38 FR 9506, Apr. 17, 1973]

PART 104—NOTIFICATION OF EMPLOYEE RIGHTS; OBLIGATIONS OF EMPLOYERS (effective date delayed indefinitely)

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

Sec.

- 104.201 What definitions apply to this part?
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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.

SOURCE: 76 FR 54046, Aug. 30, 2011, unless otherwise noted.

EFFECTIVE DATE NOTE: At 76 FR 54046, Aug. 30, 2012 part 104 was added, effective November 14, 2011. At 76 FR 63188, Oct. 12, 2011, the effective date for part 104 was delayed to January 31, 2012. At 76 FR 82133, December 30, 2011, the effective date was further delayed to April 30, 2012. At 77 FR 25868, May 2, 2012, the effective date was delayed indefinitely.

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 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 any-

one 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).

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 format, type size, and style as the Board shall prescribe. If an employer chooses to print the notice after downloading it from the Board's Web site, 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 where they are readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted. Where 20 percent or more of an employer's workforce is not proficient in English and speaks a language other than English, the employer must post the notice in the language employees speak. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must either physically post the notice in each of those languages or, at the employer's option, post the notice in the language spoken by the largest group of employees and provide each employee in each of the other language groups a copy of the notice in the appropriate language. If an employer requests from the Board a notice in a language in which it is not available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language. 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.nlr.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.nlr.gov>. Employers also may reproduce and use copies of the Board's official poster, provided that the copies duplicate the official poster in size, content, format, and size and style of type. 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, content, format, or size and style of type 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 post the required notice on an intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means. An employer that customarily posts notices to employees about personnel rules or policies 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, "Employee Rights under the National Labor Relations Act."

(2) Where 20 percent or more of an employer's workforce is not proficient

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in English and speaks a language other than English, the employer must provide notice as required in paragraph (f)(1) of this section in the language the employees speak. If an employer's workforce includes two or more groups constituting at least 20 percent of the workforce who speak different languages, the employer must provide the notice in each such language. The Board will provide translations of the link to the Board's Web site for any employer that must or wishes to display the link on its Web site. If an employer requests from the Board a notice in a language in which it is not available, the requesting employer will not be liable for non-compliance with the rule until the notice becomes available in that language.

§ 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) 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.

TABLE TO § 104.204—Continued

Employer category	Jurisdictional standard
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, <http://www.nlr.gov>.

(e) This part does not apply to the United States Postal Service.

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 or to refrain from engag-

ing in any of the above activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board (NLRB), the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

- “Under the NLRA, you have the right to:
- Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
 - Form, join or assist a union.
 - Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
 - Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
 - Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and seeking help from a union.
 - Strike and picket, depending on the purpose or means of the strike or the picketing.
 - Choose not to do any of these activities, including joining or remaining a member of a union.

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

- Prohibit you from talking about or soliciting for a union during non-work time, such

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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 or coerce you in order to gain your support for the union.

- Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.

- Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

- Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

- Take adverse action against you because you have not joined or do not support the union.

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

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

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office, which can be found on the Agency’s Web site: <http://www.nlr.gov>.

You can also contact the NLRB by calling toll-free: 1-866-667-NLRB (6572) or (TTY) 1-866-315-NLRB (1-866-315-6572) for hearing impaired.

If you do not speak or understand English well, you may obtain a translation of this notice from the NLRB’s Web site or by calling the toll-free numbers listed above.

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

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

Subpart B—General Enforcement and Complaint Procedures

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

The Board has determined that employees must be aware of their NLRA rights in order to exercise those rights effectively. Employers subject to this rule are required to post the employee notice to inform employees of their rights. Failure to post the employee notice may be found to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by NLRA Section 7, 29 U.S.C. 157, in violation of NLRA Section 8(a)(1), 29 U.S.C. 158(a)(1).

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 Sections 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 remedies are available to cure a 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 How might other Board proceedings be affected by failure to post the employee notice?

(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) Noncompliance as evidence of unlawful motive. The Board may consider a knowing and willful refusal to comply with the requirement to post the employee notice 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:

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(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.