

First Court Decision on NLRB Notice Posting Produces a Split Decision

March 6, 2012

As discussed in the Employer Alerts issued August 30 and October 6, 2011 and January 4, 2012, the National Labor Relations Board (NLRB) issued a rule requiring essentially all private employers to post a notice informing employees of their rights under the National Labor Relations Act (NLRA). The rule also provides sanctions for failing to post the notice including making the failure an unfair labor practice and tolling the six-month statute of limitation for filing an unfair labor practice charge where an employer failed to post the notice. The rule originally required employers to post the notice on November 14, 2011, but that implementation date was extended to January 31, 2012, and then to April 30, 2012 based on pending litigation.

On Friday, March 2, 2012, the U.S. District Court for the District of Columbia issued a decision in response to a legal challenge to the notice posting rule filed by the National Association of Manufacturers (NAM) and National Right to Work Legal Defense and Education Foundation (NRTW), two trade associations representing employers. The decision splits the rule into two portions, (1) the posting requirement, and (2) the potential sanctions for failing to post.

The court found that the NLRB was within its "broad rulemaking authority" to require the posting. Finding that the NLRA provided the NLRB with the "authority from time to time to make, amend, and rescind . . . such rules and regulations as may be necessary to carry out the provisions of [the NLRA]," the court held that the NLRB was acting within its powers in mandating the posting as a way to ensure that employees are aware of their rights under the NLRA. The court also found that the requirement was not arbitrary or capricious.

The court then found that both of the sanction provisions conflicted with the statutory framework of the NLRA. First, the court found that the NLRB is precluded from creating a new unfair labor practice because it is expressly limited by the explicit language of the NLRA. Congress specifically defined and limited the conduct that could constitute an unfair labor practice in the NLRA. The court held that the NLRA precludes the NLRB from finding a "blanket advance determination that a failure to post will always constitute an unfair labor practice." The opinion does, however, leave open the possibility that the NLRB may find in future cases that "the failure to post interfered with the employee's rights." This finding would have to be specific to the facts of the case.

Likewise, the court found that the provision extending or tolling the six-month statute of limitations also violated the explicit language of the NLRA. The court noted that there are circumstances when the six-month statute of limitations is tolled, but under those circumstances the burden of establishing the rationale to toll the statute of limitations was on the employee. In the rule, the NLRB essentially flipped the burden to the employer. The court found that this was not permitted by the language of the NLRA.

Finally, the court responded to the First Amendment challenges brought by the employer groups. NAM and NRTW argued that the posting required employers to "speak against their will" by posting the notice. Judge Jackson found that the posting did not involve the employer's speech, but was government speech. The posting does not require employers to say anything, but is a government notice that recites the law. As such, the court found that the notice posting did not impact any First Amendment free speech rights.

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This decision will most likely be appealed. At this point in time, employers will be required to post the notice on or before April 30, 2012. A copy of the required poster along with frequently asked questions can be found at the NLRB website at www.nlr.gov. As this case and the case filed in South Carolina proceed, we will keep you updated on your requirement to post the notice.