

South Carolina Federal District Court Finds NLRB Notice Posting Invalid; DC Court of Appeals Suspends Implementation of Posting Requirement

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As discussed in previous Employer Alerts, 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 (the Act) by April 30, 2012. Two new wrinkles have developed. Last Friday, the U.S. District Court for the District of South Carolina held that the NLRB did not have the statutory authority to require the notice posting. That decision reached a different conclusion than an earlier District of Columbia District Court opinion and set up a split in the case authority. Yesterday, the U.S. Court of Appeals for the District of Columbia ordered an expedited review and prevented the NLRB from implementing the rule until the court issues an opinion.

At least until that opinion comes out, the case in South Carolina is instructive. In *U.S. Chamber of Commerce v NLRB*, the court in South Carolina found that the Act, which gives the NLRB its power, did not provide the NLRB with the authority to mandate the notice posting. The Act gives the NLRB the power to make "such rules and regulations as may be necessary to carry out the provisions of the Act." The court found that while the NLRB may find the notice posting useful, there was no evidence that the posting requirement was *necessary* to carry out the provisions of the Act. Under the court's reading, the Act only authorized the NLRB to act in two areas: preventing and resolving unfair labor practice charges and conducting representation elections. The court held that the notice posting requirement went too far by proactively dictating employer conduct outside of the scope of these two authorized areas.

Interestingly, the court also held that Congress' failure to provide a notice posting requirement in the Act was no mere mistake or oversight. Citing at least eight other instances where Congress provided notice posting requirements in federal labor laws since the Act originally passed, the Court concluded that Congress' silence amounted to an intent not to add a posting requirement to the Act.

The notice posting requirement was scheduled to become effective on April 30. However, when the federal appellate court in DC granted an injunction yesterday, that deadline went by the wayside. The court ordered that the appeal would be expedited, scheduling oral argument for September 2012. Therefore, the notice posting requirement is now suspended until the DC Court of Appeals issues its decision on the appeal after the oral argument in September.