

NLRB Notice Posting Requirement Violates Employers' Right to Free Speech

May 9, 2013

The National Labor Relations Board (NLRB) requirement that private employers post a notice informing employees of their rights under the National Labor Relations Act (NLRA) has been invalidated by the District of Columbia Court of Appeals. In *National Association of Manufacturers v. NLRB*, the Court said the Board's August 2011 ruling violated employers' free speech rights under federal labor laws.

As a result, employers will not be required to post the notice at this time.

As discussed in previous Employer Alerts (issued August 30 and October 27, 2011, and January 4, March 6, and April 18, 2012), the NLRB issued a rule requiring essentially all private employers to post a notice informing employees of their rights under the NLRA by April 30, 2012. On April 17, 2012, the D.C. Court of Appeals issued an injunction suspending implementation of the posting requirement until it had considered the appeal of the District of Columbia District Court case challenging the legality of the posting requirement.

In its May 7, 2013, opinion, the Court focused on the language of section 8 (c) of the NLRA, which it found controlling. Section 8(c) states:

The expression of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual forms, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this [Act], if such expression contains no threat of reprisal or force or promise of benefit. 29 U.S.C. § 158(c).

The Court ruled that section 8(c) essentially incorporated the 1st Amendment rulings into the NLRA, and protects an employer or union's right to speak, as well as their right not to speak about issues covered by the Act. Finding that the posting was equivalent to forcing employers to communicate the NLRB's position, the Court held that the posting requirement violated employer's free speech rights. Further, the provisions making the failure to post the notice an unfair labor practice and treating the failure to post the notice as evidence of anti-union animus also violate the provision of section 8(c). The Court also found that the provision allowing the tolling of the statutory six-month statute of limitations where an employer had not posted the notice was invalid as contrary to the explicit provisions of the NLRA.

The Court also discussed and found that the Board had a valid quorum when the posting requirement was issued. Based on its finding that the enforcement provisions of the posting were invalid, the Court held that it did not need to determine whether the NLRB had the authority to require the posting, and that the entire posting requirement was invalid.

In a concurring opinion, Judges Henderson and Brown agreed with the majority opinion, and also stated that they would hold that the NLRB did not have the authority to require the posting in the first place, a decision the majority found it did not have to reach to find the posting invalid. The concurring opinion found that the posting was not a valid exercise of the NLRB's authority as it was not "necessary" to carry out the Act, stating, "[t]he NLRA . . . simply does not authorize the Board to impose on an employer a freestanding obligation to educate employees on the fine points of labor relations law. . . . I do not believe the Congress intended to authorize a regulation so aggressively prophylactic as the posting rule."

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At this point, the NLRB has the right to petition the U.S. Supreme Court to consider an appeal of this decision. Whether the Supreme Court will entertain an appeal may hinge on how the 4th Circuit Court of Appeals decides a similar case regarding a South Carolina district court's finding that the posting requirement is invalid. (See April 18, 2012 Employer Alert). Should the 4th Circuit's decision conflict with the D.C. Circuit's, it is more likely that the Supreme Court will ultimately decide the issue.