

D.C. Circuit Strikes Down NLRB's Notice-Posting Rule

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On May 7, 2013, the U.S. Court of Appeals for the District of Columbia ruled in *National Association of Manufacturers v. NLRB* that the National Labor Relations Board's rule requiring employers to post notices informing employees of their rights under the National Labor Relations Act violated the Act and therefore was invalid.

As discussed in a previous alert, in August 2011, the NLRB, under its rule-making authority, issued a rule requiring employers within its jurisdiction to post on their properties and websites a NLRB-authored poster notifying employees of their rights under the Act. To enforce the notice-posting requirement, the rule provides that an employer's failure to post the notice would constitute an unfair labor practice in violation of Section 8(a)(1) of the Act.

The rule also permits the Board to suspend the running of the six-month limitations period for filing an unfair-labor-practice charge where the employee has not received notice that the conduct complained of is unlawful and allows the Board to consider an employer's failure to post the notice as evidence of an unlawful motive on the part of the employer. In response to the rule, trade associations and other employer groups filed complaints in federal court, arguing that the rule was unlawful. After the lawsuits were filed, the D.C. Circuit issued an injunction against implementation of the rule pending the outcome of this appeal.

In its appellate ruling last week, the D.C. Circuit held that the notice-posting rule violates Section 8(c) of the Act, which provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form" shall not constitute an unfair labor practice as long as it contains no threats of reprisal or force or promise of benefit.

Ultimately, the court held that the rule violates §8(c) because it makes an employer's refusal to post the required notice (and disseminate the Board's speech) an unfair labor practice and treats the failure to post the required notice as evidence of anti-union animus. Additionally, the Court held that the rule exceeds the Board's statutory authority by amending the statute of limitations applicable to unfair-labor-practice charges that was set forth by Congress. In the end, the Court did not address whether the Board lacked authority to issue the notice-posting requirement itself. However, the Board vacated the entire rule because all three of the rule's enforcement mechanisms were invalid and the notice-posting requirement was not severable from the remainder of the rule.

The D.C. Circuit's ruling provides a further reprieve for employers from complying with the notice-posting requirement. However, the ruling is unlikely to be the last word on the matter. It is expected that the Supreme Court will weigh in on the validity of the rule in the near future.

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