

Court of Appeals Enjoins Implementation of NLRB Rule Regarding Notices About Workers' Rights

April 19, 2012

On August 25, 2011, the National Labor Relations Board (“NLRB”) implemented a rule requiring virtually all private employers in the United States to post a notice about workers’ rights under the National Labor Relations Act (“NLRA”). (For more information about the form and content of the required notice, please see Foley Hoag’s August 26, 2011 employment bulletin.) Although the rule was scheduled to take effect on April 30, 2012, the Court of Appeals for the D.C. Circuit issued an injunction earlier this week against implementation of the rule pending the outcome of an appeal.

The notice-posting rule was originally scheduled to take effect in November 2011. Before the implementation date, however, the National Association of Manufacturers and other business groups filed a lawsuit challenging the regulation in the District Court for the District of Columbia. The plaintiffs alleged that the NLRB lacked authority to promulgate the rule. After the lawsuit was filed, the NLRB postponed the effective date of the rule until January 31, 2012, and then again until April 30, 2012.

On March 2, 2012, the district court held that the NLRB had a “broad, express grant of rulemaking authority” under the statute and that it could require employers to post the notice. However, the district court found that the NLRB exceeded its authority as to the rule’s remedial scheme, which provided that the failure to post the required notice was an unfair labor practice under the statute and tolled the statute of limitations.

The plaintiffs appealed the district court’s decision that the NLRB could require employers to post the notice. The plaintiffs also filed an emergency motion for an injunction to prevent the rule from going into effect while the appeal was pending. On April 17, 2012, the D.C. Circuit granted the emergency motion, enjoining the NLRB from implementing the rule. In its order, the D.C. Circuit stated that the “uncertainty about enforcement” of the rule “counsels further in favor of temporarily preserving the status quo while this court resolves all of the issues on the merits.” The appeal will not be heard until September, and the court is unlikely to issue a decision for several months thereafter.

The NLRB is also facing a separate legal challenge to the notice-posting rule brought by the U.S. Chamber of Commerce and South Carolina Chamber of Commerce. On April 13, the U.S. District Court for the District of South Carolina ruled that the NLRB exceeded its authority by promulgating the notice-posting requirement. The NLRB disagrees with this ruling and will file an appeal.

We will notify you if, or when, the NLRB’s notice-posting rule will be implemented.

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