

April 20, 2012

Practice Group:

*Labor and
Employment*

NLRB Posting Requirement Delayed by Recent Court Rulings

By Michael A. Pavlick

Court decisions in the past few days have delayed yet again the National Labor Relations Board's (NLRB) new notice posting rule, which was scheduled to take effect on April 30, 2012 after a previous delay. A federal trial court in South Carolina invalidated the NLRB's rule in its entirety, and a federal appeals court in Washington, D.C. ordered that implementation of the rule be stayed pending further legal proceedings. As a consequence, at least for the time being, employers are not required to post the statement of employee rights under the National Labor Relations Act (NLRA).

The journey to this point started with the NLRB's controversial decision to publish a final rule in August 2011 which requires employers to post a notice to employees explaining their rights to unionize and to negotiate with their employers about terms and conditions of employment. The rule also provides that if an employer fails to comply with the notice posting requirement, it can be found to have committed an unfair labor practice and, moreover, the six-month period unions and employees have to file unfair labor practice charges can be extended to account for non-compliance. See our previous alert on the rule [here](#) for more details on the final rule and its subsequent follow-up [alert](#) when the rules were initially postponed.

Business groups filed two challenges in federal district courts, one in the District of Columbia and the other in Charleston, South Carolina. The D.C. court ruled first, in early March, upholding the right of the NLRB to promulgate the rule and to require the posting. However, the court struck down those parts of the final rule, which made failure to post an unfair labor practice and a basis for tolling the time period to file unfair labor practice charges. The D.C. court's decision was appealed to the United States Court of Appeals for the District of Columbia.

Last Friday, April 13, 2012, the South Carolina court went further, and invalidated the entire rule. The court found that the NLRB's power to create new rules was limited to those that are "necessary" to carry out the NLRA's provisions, and that the posting rule, while perhaps "useful," was not necessary and was inconsistent with the statutory scheme.

Over the weekend and into the early part of this week, there was considerable discussion about what the two district court decisions meant. Questions abounded, such as: How could the conflict between the two decisions be reconciled? Was the South Carolina decision limited to South Carolina? Would there be a third delay in implementation of the final posting rule? And would the South Carolina decision be appealed?

Then, on Tuesday, April 17, 2012, the United States Court of Appeals for the District of Columbia issued an emergency order prohibiting the NLRB from enforcing the final posting rule, pending a ruling on the merits. Later that day, the NLRB reaffirmed its commitment to the final rule but stated that its regional offices would not implement the rule pending resolution of the appeal of the D.C. court's decision and the anticipated appeal of the South Carolina court's ruling.

So where does this leave employers? At least for the time being, employers need not post the notice required by the final rule. Both the D.C. appeals court and the United States Court of Appeals for the Fourth Circuit, which has jurisdiction over South Carolina, will entertain the separate appeals of the

NLRB Posting Requirement Delayed by Recent Court Rulings

district courts' rulings. The resolutions of those appeals could either confirm the enforceability of some or all of the NLRB's final posting rule (at which point the NLRB would likely set a new deadline for compliance), or invalidate the posting rule in its entirety. Regardless, the losing party or parties may choose to seek review by the United States Supreme Court, a result made even more likely if the D.C. Circuit and the Fourth Circuit appeals courts reach opposing conclusions regarding the viability of the final rule. Such a request for review by the Supreme Court could result in even more uncertainty and delay. In the meantime, K&L Gates LLP will keep you abreast of important developments and explain the practical implications for employers of the legal decisions that are made on this important issue.

Authors:

Michael A. Pavlick
michael.pavlick@klgates.com
+1.412.355.6275

K&L GATES

Anchorage Austin Beijing Berlin Boston Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt Harrisburg
Hong Kong London Los Angeles Miami Milan Moscow Newark New York Orange County Palo Alto Paris Pittsburgh Portland Raleigh
Research Triangle Park San Diego San Francisco São Paulo Seattle Shanghai Singapore Spokane Taipei Tokyo Warsaw Washington, D.C.

K&L Gates includes lawyers practicing out of more than 40 fully integrated offices located in North America, Europe, Asia, South America, and the Middle East, and represents numerous GLOBAL 500, FORTUNE 100, and FTSE 100 corporations, in addition to growth and middle market companies, entrepreneurs, capital market participants and public sector entities. For more information about K&L Gates or its locations and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2012 K&L Gates LLP. All Rights Reserved.