



LABOR & EMPLOYMENT DEPARTMENT

ALERT

COURT UPHOLDS NLRB NOTICE RULE BUT STRIKES DOWN SANCTIONS

By Scott Cooper

A Washington, DC federal district court has held that the National Labor Relations Board (the NLRB or Board) acted within its statutory authority in adopting a controversial notice-posting requirement in August 2011. But the Board lacks the power to enforce the rule's punitive measures, the court ruled.

On August 25, the NLRB announced that nearly all private sector employers subject to the National Labor Relations Act (the Act) — even those employers without unionized workforces — must post a notice informing employees of their rights under the Act. The notice-posting requirement takes effect on April 30, 2012.

Specifically, the notice informs employees they have the right to act together to improve wages and working conditions; to form, join and assist a union; to bargain collectively with their employer; and to refrain from any of these activities. It also provides examples of unlawful employer and union conduct and instructs employees how to contact the NLRB with questions or complaints.

Under the Board's rule, failure to comply with the posting requirement would be considered an unfair labor practice and would result in an order from the NLRB to post the notice. Furthermore, the rule provided that the Board would be allowed to extend the Act's six-month statute of limitations for filing an unfair labor practice charge involving independent unfair labor practices against the employer due to its failure to post the notice. In addition, the rule enabled the NLRB to consider a knowing and willful refusal to comply with the posting

requirement as evidence of unlawful motive in a case in which motive is an issue.

In an opinion released on March 2, 2012, Judge Amy Berman Jackson held that the Board has a right to require employers to post the notice, but that it does not have the authority to impose the exacting penalties described in the rule. Specifically, the decision struck down the rule's provisions that created a new unfair labor practice for violation of the rule and allowed the Board to extend the statute of limitations for unfair labor practices if an employer failed to post the notice.

The opinion noted that the Board exceeded its authority in promulgating the rule, and that, to find an unfair labor practice as a result of an employer's failure to comply with the posting rule, the Board must first "make a specific finding based on the facts and circumstances in the individual case before it that the failure to post interfered with the employee's exercise of his or her rights."

Judge Jackson noted that the plaintiff or employee must usually bear the burden of establishing that tolling of the six-month statute of limitations for filing an unfair labor practice charge should apply, and to construct a rule that mandates otherwise would be to turn "the burden of proof on its head."

The rule is scheduled to take effect on April 30, 2012, by which time all covered employers must post the Board's notice. Employers should note that, although the court's decision prevents the NLRB from making a

blanket determination that failing to post the required notice violates the Act, Board Chairman Mark Gaston Pearce was still pleased by the court's recognition that the NLRB may use individualized, case-by-case determinations to find that an employer's failure to post the notice constitutes an unfair labor practice.

The 11-by-17-inch notice should be posted in a conspicuous place, where other notifications of workplace rights and employer rules and policies are posted. Copies also are available from any of the agency's regional offices. In addition, employers should

publish a link to the notice on an internal or external website if other personnel policies or workplace notices are posted there.

Employers are urged to contact qualified counsel to ensure compliance with the new rule so that any negative consequences can be avoided.

For more information about this alert, please contact Scott Cooper at 973.994.7513 or scooper@foxrothschild.com or any member of Fox Rothschild's Labor & Employment Department.



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