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APPEALS COURT HOLDS BOARD'S NOTICE RULE INCONSISTENT WITH EMPLOYER FREE SPEECH

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The saga of the National Labor Relations Board's ("Board") Notice posting rule continues. If you recall from our prior Alerts, in 2011 the Board issued a Rule mandating the posting of an 11" x 17" Notice in virtually every private sector workplace in the country - union or not - informing employees of their rights under the National Labor Relations Act ("Act"). Employers also were required to post the notice on an intranet or an internet site if personnel rules and policies are customarily posted there, or provide a link to the Notice on the Board website, www.nlrb.gov.

This Rule was challenged in two cases, one in the District of Columbia, and one in South Carolina (brought by the U.S. Chamber of Commerce). In both cases, but for varying reasons, the Rule was held to be invalid.

Yesterday, the Court of Appeals for the District of Columbia struck down the entirety of the Board's Rule. The Court held that the rule requiring businesses to post notices of worker rights violated the free speech rights of employers under Section 8(c) of the National Labor Relations Act ("Act") and thus is invalid. *National Ass'n of Mfrs. v. NLRB, (*D.C. Cir., No. 12-5068, 5/7/13). The Court noted that the First Amendment to the U. S. Constitution protects the dissemination of messages as well as their creation, as does Section 8(c), and that "[t]he right to disseminate another's speech necessarily includes the right to decide not to disseminate it."

As the Court wrote:

> We therefore conclude that the Board's rule violates § 8(c) because it makes an employer's failure to post the Board's notice an unfair labor practice, and because it treats such a failure as evidence of anti-union animus in cases involving, for example, unlawfully motivated firings or refusals to hire-in other words, because it treats such a failure as evidence of an unfair labor practice.

The Court's opinion did not address the board's authority to promulgate rules under Section 6 of the Act; rather, it held that since the board's requirement for the posting of

employee rights notices is not severable from its invalid enforcement provisions, it "must therefore fall along with the rest of the Board's posting rule." Two of the three justices, however, wrote in a concurrence that Congress did not intend "to authorize a regulation so aggressively prophylactic as the posting rule" and therefore the Board lacked authority to promulgate the rule at all.

The second lawsuit challenging the notice-posting regulation, *Chamber of Commerce v. NLRB*, 856 F. Supp. 2d 778 (D.S.C. 2012), was argued before the U.S. Court of Appeals for the Fourth Circuit on March 19, 2013, and a decision is pending. In this case, the U.S. District Court for the District of South Carolina held that NLRB exceeded its authority in adopting the rule and found the entire rule invalid, as the concurrence advocated in the D.C. case.

This alert was prepared by Geoffrey P. Wermuth, a partner in the law firm of Murphy, Hesse, Toomey & Lehane, LLP. If you have any questions or concerns with regard to this alert, please contact Attorney Wermuth, the attorney assigned to your account, or your own labor counsel.

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