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## COURT STRIKES DOWN NLRB POSTER REQUIREMENT

By David Phippen  
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A federal judge in Charleston, South Carolina, has **struck down** the requirement of the National Labor Relations Board that employers post an employee rights poster as of April 30, 2012. The decision comes on the heels of a decision from another judge, **this one in the District of Columbia**, who ruled that the requirement was lawful but that certain enforcement mechanisms related to the posting requirement were unlawful. Employers are thus currently left with two different and conflicting interpretations of the NLRB's authority to make and enforce its poster rule.

In the South Carolina case, the U.S. and state Chambers of Commerce argued that the NLRB's requirement, made by agency regulation, was not authorized by the National Labor Relations Act and therefore violated the Administrative Procedure Act. Arguing in support of its poster rule, the NLRB contended chiefly that Section 6 of the Act allowed the poster rule as one "necessary to carry out the" Act.

Judge David C. Norton found that under the plain language of the Act, the poster rule was not "necessary to carry out the" Act. According to the Judge, the Act envisions a "reactive" instead of "proactive" role for the NLRB. Its actions come into play only upon the filing of an unfair labor practice charge or a question concerning representation. He found that the poster rule was a proactive measure fundamentally different from and inconsistent with the NLRB's typical "reactive" role. Although the poster rule was potentially useful to the NLRB's desired goals, it was not "necessary to carry out the" Act. Moreover, the judge relied on the fact that, unlike at least nine other employment laws enacted during the past 75 years that expressly included poster requirements, the NLRA had no language referencing or authorizing notice posting. Finally, the judge found that the poster rule could not be sustained as filling a gap in the statute, which the NLRB argued it was doing with the rule.

The NLRB is likely to appeal Judge Norton's ruling, but still up in the air is the practical issue of what employers should do if April 30 comes and the posting deadline is not extended by the NLRB or stayed by the court. Stay tuned. We will update you here with any breaking news and advice on how to best proceed.

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