



## Special Edition -- Court Issues Decision on the NLRB's Posting Requirement

The court's ruling in *National Association of Manufacturers v. NLRB*, Civil Case No. 11-1629 (ABJ) (USDCDC March 2, 2012) is in, and it is a split decision. The bad news for employers is that the court has upheld the NLRB's authority to issue a rule requiring employers to post the notice to employees informing them of their rights under the National Labor Relations Act (NLRA). The good news is that the court struck down the portions of the rule providing that the failure to post the notice would be deemed an unfair labor practice in and of itself and would also constitute grounds for tolling (staying) the short six-month statute of limitations applicable to unfair labor practice charges under the Act.

### What does this mean to employers?

Failing to post the required notice will not automatically be deemed an unfair labor practice, but it can have adverse consequences. First, it may be used as evidence of an employer's anti-union animus in cases in which this is an element of the Board's General Counsel's burden of proof. Second, although the Board struck down the portion of the rule stating that the NLRB could *infer* that the failure to post was good cause to toll the statute of limitations for filing an unfair labor practice charge, it left open the question of whether the failure to post *could* be used to justify an *equitable* tolling of the statute of limitations in a case in which the employee argues and proves that he or she was unaware of his/her rights under the Act. This allows employees to try to argue, "I didn't file my unfair labor practice charge on time because I did not know my rights under the Act because there was no NLRA notice posting. So, it was my employer's fault that my charge was late, and the Board should not penalize me for this by not allowing me to file it." Third, the failure to post could also be used by the Board as justification for overturning an election result which was in favor of the employer.

**As it stands now, the NLRA notice must be posted as of April 30, 2012.** The "teeth" of the enforcement provisions of the posting rule -- the automatic creation of an unfair labor practice -- have been filed down, and the "bite" may not be as painful, but failing to post the notice may still have adverse consequences, as outlined above.

For further information on this requirement, or for a copy of the required posting, please contact Bill Trumpeter or any member of our Labor Law Practice Group.

#### Event Date

Mon, 2012-03-05

#### Related Attorneys

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#### Practice Areas

Labor & Employment

Labor Relations