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## **NLRB Posting Requirement Struck Down by Court; Federal Contractors Still on the Hook**

On May 7, 2013, the D.C. Circuit vacated a National Labor Relations Board ("NLRB" or "Board") rule that would require most private sector employers to display a poster informing employees of their rights under the National Labor Relations Act ("NLRA" or "the Act"), including their right to unionize.

The NLRB's August 2011 regulation required employers to post a conspicuous notice informing employees of their right to unionize, and made an employer's failure to comply with the posting an unfair labor practice. The Board argued that it drew its authority to require the posting from Section 6 of the NLRA, which vests authority in the Board to promulgate "rules and regulations as may be necessary to carry out the provisions" of the Act. The district court agreed that Section 6 indeed provided the NLRB with authority to issue the rule, but found that Section 8(c) of the Act precluded the NLRB from making a blanket determination that an employer's failure to post constitutes an unfair labor practice in every case.

On appeal, the Circuit Court dodged the Section 6 analysis and instead held that because Section 8(c) provides employers with the right to speech as long as the speech is not threatening or coercive, it also provides employers with the right to remain silent. As a result, the court ruled that the NLRB's posting rule would violate employers' right not to inform employees of their right to unionize, particularly considering that the rule made it an unfair labor practice where employers wished to exercise their right to stay silent. The court also ruled that the NLRB had failed to show that Congress intended to allow the tolling of the statute of limitations for filing unfair labor practice charges when an employer

failed to put up the poster. Having found the rule's enforcement mechanisms invalid under the Act, and noting that the NLRB did not intend the rule to be a voluntary posting requirement, the court struck down the rule in its entirety.

While this ruling is a "win" for employers, it is important to remember that employers that have contracts or subcontracts with federal government agencies remain obligated under Executive Order 13496 to post a similar notice informing employees of their rights under the NLRA.

Ultimately, the NLRB may petition the Supreme Court to review the decision. For now, non-government contractors and employers need not post notices of employees' rights under the NLRA, including their right to unionize. Thompson Coburn will keep you informed of any further decisions that will impact required postings or other NLRB rules and regulations.

Thompson Coburn attorneys, including Timothy J. Sarsfield, are available to consult with employers regarding the best course of action.

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