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ACT NOW ADVISORY

National Labor Relations Board Is Enjoined from Enforcing Its Notice-Posting Rule

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The National Labor Relations Board ("NLRB" or "Board") announced on April 17, 2012, that it will not implement its notice-posting rule ("Rule") on April 30, 2012, as it had previously declared it would. Prior to the NLRB's announcement, recent and conflicting decisions issued by federal district courts in the District of Columbia and South Carolina left employers pondering the question of whether or not to post the NLRB's new notice entitled "Employee Rights Under the National Labor Relations Act" ("Notice"), which the Board had mandated that all employers post in their workplaces by the end of this month as part of its initiative to make itself relevant and to educate employees of their rights under the National Labor Relations Act ("NLRA" or "Act").

The Board's recent retreat followed the U.S. Court of Appeals for the District of Columbia's order, also issued on April 17, 2012, which granted an emergency injunction pending appeal, staying the requirement for employers to post the Notice. The Board has stated that it will not require the posting of the Notice until the appeals from the district courts are resolved. Therefore, employers will not be required to post the Notice for the foreseeable future.

A Brief History of the Rule

On August 30, 2011, the NLRB published the Rule in the *Federal Register* (29 C.F.R. Part 104). The Rule would require most private-sector employers to notify covered employees of their rights under the Act by way of posting the Notice. The Board has twice postponed implementation of the new posting requirement. Until the recent order from the D.C. Circuit, the requirement to post the Notice would have taken effect on April 30, 2012.

Among the most controversial provisions of the Rule were the enforcement mechanisms intended to compel employer compliance. Under the Rule, an employer's failure to post the Notice would constitute an unfair labor practice, and could also extend the NLRA's six-month statute of limitations for filing a charge involving other unfair labor practice allegations against the employer.

Challenges to the Rule in the Federal District Courts

Since the Rule's publication last summer, two lawsuits have been proceeding, challenging the Board's authority to implement the Rule. Industry groups, including the

National Association of Manufacturers, filed complaints in the U.S. District Court for the District of Columbia; the U.S. Chamber of Commerce and South Carolina Chamber of Commerce filed a complaint in the U.S. District Court for the District of South Carolina. The lawsuits alleged some or all of the following:

1) The NLRA does not give the NLRB the authority to promulgate and issue a rule requiring employers to post a notification of employee rights under the NLRA.

2) The Board does not have authority to assert jurisdiction over an employer, absent the filing of an unfair labor practice charge against the employer.

3) The Board does not have authority to create a new unfair labor practice charge based upon an employer's failure to post the Notice.

4) The Board does not have the authority to issue a rule that would toll the Act's statute of limitations, and such rule is contrary to Section 10(b) of the Act.

5) The Rule violates the Administrative Procedure Act ("APA") (5 U.S.C. Section 701 *et seq.*) because the NLRA does not grant the Board the authority to promulgate the Rule.

6) The Board acted in an arbitrary and capricious manner and abused its discretion under the APA by issuing the Rule.

7) The Rule violates employers' First Amendment rights, as it coerces employers' speech.[1]

The complaints filed in the District of Columbia were consolidated and assigned to Judge Amy Berman Jackson (11-CV-1629), who was appointed by President Obama. On March 2, 2012, Judge Jackson found that, while the Board did have the authority to issue the Rule and could require employers to post the Notice, the Board lacked authority to (1) deem a failure by an employer to post the Notice to be an independent unfair labor practice, and (2) automatically extend the statute of limitations provided in Section 10(b) of the NLRA.

The plaintiffs in that case appealed Judge Jackson's finding that the Board could require the posting of the Notice to the U.S. Court of Appeals for the District of Columbia. On March 7, 2012, Judge Jackson denied plaintiffs' motion for an injunction, staying the Board's implementation of the Rule pending appeal. The Board has stated that it intends to cross-appeal Judge Jackson's decision with respect to the invalidation of its enforcement mechanisms.

[1] An additional challenge to the Rule was brought by Congressman Ben Quayle in the form of a House of Representatives bill, H.R. 2833. The bill would repeal the Rule requiring employers to post notices relating to the NLRA, and would also prohibit the NLRB from promulgating or enforcing any rule that requires employers to post notices relating to the NLRA on or after the date of the bill's enactment. The bill has been referred to the House Committee on Education and the Workforce.

On April 17, 2012, the U.S. Court of Appeals for the District of Columbia granted the plaintiffs' motion for an order staying the notice-posting requirement pending appeal. The Court of Appeals found that the appellants satisfied the requirements for an injunction by demonstrating (1) a strong likelihood of success on the merits, (2) that employers would be irreparably harmed if the injunction were not granted, (3) the NLRB would suffer no harm by staying the notice-posting requirement, and (4) public interest supported the granting of the injunction. Additionally, the Court of Appeals stated in its order that the Board's two earlier postponements of the implementation of the Rule during the pendency of the district court proceedings were in tension with its contention that the Rule should be allowed to take effect during the pendency of the appellate proceedings. And while the district court stated that the Rule could be implemented, the primary enforcement mechanisms – i.e., an employer's failure to post the Notice serving as an independent unfair labor practice charge and/or tolling the statute of limitations for the filing of an unfair labor practice charge – were invalidated, leaving uncertainty regarding enforcement by the Board against an employer that fails to post the Notice. The Court of Appeals stated that "**[t]he uncertainty about enforcement counsels further in favor of temporarily preserving the status quo while this court resolves all of the issues on the merits**."

In the U.S. District Court for the District of South Carolina litigation (11-CV-2516), Judge David C. Norton, who was appointed by President George H.W. Bush in 1990, issued a decision on April 13, 2012. Judge Norton found that the Board exceeded its authority in promulgating the Rule and that the NLRB lacked the authority to require employers to post the Notice. Judge Norton described the NLRB as a reactive agency and stated that "there is not a single trace of statutory text that indicates that Congress intended for the [NLRB] to proactively regulate employers in this manner." The Board has stated that it disagrees with Judge Norton's decision and will appeal.

Due to conflicting district court decisions in South Carolina and in the District of Columbia, and as a result of the U.S. Court of Appeals for the District of Columbia's order granting an emergency injunction on April 17, 2012, stopping the Rule from taking effect pending appeal, the Board announced that the Rule will not take effect on April 30, 2012, stating on its website that "in light of the strong interest in the uniform implementation and administration of agency rules, regional offices will not implement the rule pending the resolution of the issues before the court."

What Employers Should Do Now

- Employers need not post the Notice by April 30, 2012.

- For employers who have already posted the Notice, given the rulings by the U.S. District Court for the District of South Carolina and the U.S. Court of Appeals for the District of Columbia and statements by the Board, it is clear that any such Notices already posted may be removed.

Oral argument on the appeal in the D.C. Circuit is currently scheduled for September 2012. We will keep you apprised as this issue continues to develop.

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For further advice on how to proceed in light of the pending litigations, or for further information about this Advisory, please contact:

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