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## Court Invalidates NLRB Notice Posting Rule

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On May 7, 2013, the United States Court of Appeals for the District of Columbia Circuit issued a decision that invalidated a rule by the National Labor Relations Board ("NLRB" or "Board") that required all private employers, including those without unionized workforces, to post notices titled "Notification of Employee Rights" in the workplace. The court's decision was set forth in [National Association of Manufacturers v. NLRB](#), 2013 WL 1876234 (May 7, 2013). For the D.C Circuit Court, this is the [second decision](#) this year that has restricted the NLRB's authority.

Historically, the NLRB has had the remedial authority to require employers that have been found to have committed unfair labor practices to post a "Notice to Employees" in the workplace where the violation occurred. This remedial notice informs employees of the employer's obligation to correct conduct found by the Board to be unlawful and typically included a recitation of employee rights protected by the National Labor Relations Act ("NLRA" or "Act"), as well as a commitment by the employer to remedy the specific conduct found by the Board to violate the Act.

However, in August 2011, the NLRB adopted a rule requiring all private employers to post a notice of employee/union rights under the Act, regardless of whether the employer had ever even been accused of committing any unfair labor practice. The Board asserted the rule was proper and necessary, reasoning that employees needed to be aware of their rights in order to exercise them. The posting requirement, standing alone, may not have prompted much of a backlash. However, the Board heightened employer opposition to the rule by providing three new penalties against an employer who failed to post the required notice:

1. An employer's failure to post the notice would be considered an unfair labor practice;
2. The NLRB would suspend the running of the six-month limitations period for filing unfair labor practice charges during times when the notice was not posted; and
3. The NLRB would consider an employer's "knowing and willful refusal to comply with the requirement to post the employee notice as evidence of unlawful motive in a case in which motive is an issue," thereby allowing the NLRB to find another violation of the NLRA.

The rule faced immediate opposition from employers- and business-rights groups. Several employer associations challenged the notice-posting rule in federal district court in the District of Columbia. The district court invalidated certain aspects of the rule but upheld others. Specifically, the district court held that the Board had the authority to issue the notice-posting requirement under Section 6 of the NLRA. However, the Court also held that the Board exceeded its authority by making an employer's failure to post the notice an unfair labor practice and by tolling the running of the six-month limitations period for filing unfair labor practice charges during times when the notice was not posted. On this holding, the district court temporarily enjoined enforcement of the rule. In response, the Board delayed implementation of the rule and appealed the district court's decision. In its May 7, 2013, decision in *Manufacturers*, the D.C. Circuit Court completely invalidated the Board's rule.

#### **The Decision:**

In *Manufacturers*, the D.C. Circuit Court vacated the rule and held that the notice-posting requirement violated employers' free speech rights under Section 8(c) of the Act. The Court further held that the rule's grant of the ability to toll the six-month limitations period violated Section 10(b) of the Act.

In reaching this decision, the court found that Section 8(c) protects an employer's right to free speech, which includes both the right to speak and the right to refrain from speaking. Because the rule required employers to post the notice and included a threat of an unfair labor practice for noncompliance, the D.C. Circuit Court held that the rule effectively violated an employer's right to decide which speech it wanted to disseminate.

The court further held that the rule violated Section 10(b) of the Act by tolling of the Act's six-month limitations period for filing an unfair labor practice charge. The court found that the rule's attempted "equitable tolling" of the limitations period was improper because the Board failed to show it was consistent with Congressional intent.

#### **Practical Impact for Employers:**

This case is a victory for employers worried about compliance with the

2011 posting rule and the rule's ability to establish an unfair labor practice against the employer for noncompliance. For now, employers do not have to post this notice in the workplace. However, it is important to note that this case has no impact on the obligations of federal contractors and subcontractors to post a similar notice under Executive Order 13496.

Nonetheless, this issue is not yet settled. The Board has several options available. First, it can file a discretionary appeal of the D.C. Circuit's decision with the Supreme Court. The Board can also "go back to the drawing board" and issue a revised rule consistent with the allowable parameters outlined in the D.C. Circuit Court's ruling. This option, however, would be liable to attack under the D.C. Circuit Court's recent *Noel Canning* decision because under that decision, which the Board is in the process of appealing to the Supreme Court, the Board does not have a proper quorum to implement rules under the NLRA. Finally, the Board simply could wait until the Senate confirms members to the Board. This is the least likely option for the Board to take given the current political climate and the Board's recent announcement that the *Noel Canning* decision will not interfere with its intention to operate as usual.

While developments regarding this issue continue to unfold, employers should work closely with their labor counsel to ensure they pursue appropriate labor relations and litigation strategies while federal labor law remains in flux.

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