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NLRB's Employee Rights Poster Rule Is Invalidated By Court: What Does It Mean To Employers?

The federal appeals court for the District of Columbia Circuit, on May 7, 2013, invalidated the National Labor Relations Board's controversial rule to require private sector employers subject to the NLRB's jurisdiction – virtually all private sector employers, both unionized and non-unionized – to post a notice about "Employee Rights Under the National Labor Relations Act." The rule violated Section 8(c) of the National Labor Relations Act, which grants employers freedom of speech, for the following reason: the rule "makes an employer's failure to post the Board's poster an unfair labor practice," and, by treating the failure to post as "evidence of anti-union" bias in other cases, the rule also treats such a failure "as evidence of an unfair labor practice." In a concurring opinion, two of the three judges further stated that the NLRB lacked the authority to even promulgate the posting rule because it was not "necessary" to "carry out the express provisions of the Act."

The NLRB's poster rule was published in 2011 and was scheduled to take effect on April 30, 2012. The status of that rule had been in limbo since April 17, 2012, when the federal appeals court temporarily blocked its implementation while the court reviewed whether the NLRB had the legal authority to impose the poster rule.

The court's invalidation of the poster rule means that employers will not have to post the NLRB's "Employee Rights Under the National Labor Relations Act" notice unless or until the three-judge panel's decision is reversed by a decision of all of the judges on the District of Columbia Circuit Court of Appeals or by the United States Supreme Court. Another appeal about the poster rule remains pending in a different federal appeals court.

The "Employee Rights Under the National Labor Relations Act" poster informed employees of both their legal rights under the National Labor Relations Act and, as the court stated, "more specific employee rights the Board derived from judicial and Board interpretations of the Act." But, as the appeals court noted, employers objected to the message that the NLRB sought to order them "to publish on their premises:" employers "see the poster as one-sided, as favoring unionization, because it 'fails to notify employees,…, of their rights to decertify a union, to refuse to pay dues to a union in a right-to-work state, and to object to payment of dues in excess of the amounts required for representational purposes.'"

Under Section 8(c), the NLRB, as the court stated, cannot charge "an employer with an unfair labor practice for posting a notice advising employees of their right not to join a union." The court rhetorically asked: "How then can it be an unfair labor practice for an employer to refuse to post a government notice informing employee of their right to unionize (or to refuse to)?" Answering its question, the court stated: Section 8(c) "necessarily protects – as against the Board… -- the right of employers (and unions) not to speak." The NLRB's poster rule violated Section 8(c) by penalizing an employer for failing to "speak" by not posting the NLRB's notice.

The NLRB's officially-stated reason for the poster rule was to educate non-unionized employees about their right to unionize, and its unofficial reason was to increase the unionization rate among private sector employees. But the concurring opinion stated that "nothing" in the National Labor Relations Act suggested that the "burden" of educating employees – "filling the 'knowledge gap'" – "should fall on the employer's shoulders" by a requirement to post the NLRB's

"Employee Rights Under the National Labor Relations Act" notice. The Act, according to the concurring opinion, "simply does not authorize the Board to impose on an employer a freestanding obligation to educate its employees on the fine points of labor relations law."

Employers will not have to comply with the NLRB's now invalid rule requiring the posting of the "Employee Rights Under the National Labor Relations Act" notice unless the court's decision is reversed. The poster rule, however, was only one of many actions that the pro-union NLRB is taking to regulate employer's policies, rules, and actions and to increase unionization among private sector employees. The NLRB, for example, continues to issue decisions that make various employer policies and rules unlawful. An employer should update its policies and rules to ensure that they comply with current NLRB rulings. To prepare itself for the risk of union organizing activity, a non-unionized employer also should review and update its plan for remaining non-unionized, assess its vulnerability to union organizing activity, remedy any weaknesses in how it treats, compensates, and communicates with its employees, and train its supervisors and managers about why it wants to remain union-free and how it plans to achieve that goal.

If you have any questions about the NLRB's poster rule, what the court's decision means, or how to remain union-free, please contact your Butzel Long attorney or the author of this Client Alert.

Gary Klotz
313 225-7034
klotz@butzel.com