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Courts Throw Wrenches in NLRB's Poster Requirement: Posting Requirement is Now on Hold

The controversial rule promulgated by the National Labor Relations Board late last year incurred two major setbacks by the courts this past week. Under the rule, virtually all private sector employers -- unionized and non-union -- are to post an 11x17 poster in all workplaces advising employees of their rights under the National Labor Relations Act, including the right to organize unions. While the deadline for posting was initially set for a few months ago, to allow time for some of the legal challenges to reach some conclusion, the NLRB delayed the effective date until April 30, 2012.

Business groups and the management bar have challenged the Board's legal authority to implement this rule because, in part, unlike other laws such as the Fair Labor Standards Act and Title VII, the NLRA does not empower the Board to require employers to make such postings. Instead, postings are only allowed if unfair labor practices have been found to have occurred.

Earlier Decisions with Mixed Results

On April 13th, the federal court for the District of South Carolina agreed with the U.S. Chamber of Commerce and other plaintiffs that the Board lacked the authority to issue the new rule in its entirety. The NLRB has announced its intention to appeal that ruling to the Fourth Circuit Court of Appeals.

In March, however, the U.S. District Court for the District of Columbia, in a case brought by the National Association of Manufacturers ("NAM") and other employer-related groups, reached a slightly different conclusion. That court held that the Board had the right to issue a rule requiring postings, but lacked the authority to mandate that the failure to do so constituted an unfair labor practice and would serve to toll the statute of limitations for filing unfair labor practices. That case was appealed to the United States Court of Appeals for the District of Columbia.

Latest Decision Enjoins the NLRB from Enforcing Rule

On April 17th, the Court of Appeals for the District of Columbia issued a two page opinion granting an emergency injunction staying the implementation of the rule while the NAM case is pending appeal. With this order, the NLRB's rule is effectively placed on hold and employers need not implement the rule until further action of the court. Consistent with this ruling, the NLRB has also announced that "in light of the strong interest in the uniform implementation and administration of agency rules, regional offices [of the NLRB] will not implement the rule pending resolution of the issues before the court." Due to the court's briefing schedule and the court's calendar, a decision is not expected until at least some time this fall.

Thus, at least for the time being, employers need not adhere to the posting rule, and employers who have already begun to comply with that rule may take down those posters.

The battle over the legality of the rule will continue in these two federal courts of appeal and perhaps elsewhere. It may

take more than a year for this issue to reach a final resolution. Butzel Long will continue to closely watch developments on this issue and issue advisories as the status of the rule changes, if at all. Should you have any questions on this matter in the meantime, do not hesitate to contact the writer of this Alert or any other member of Butzel Long's Labor and Employment Law Group.

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