

March 5, 2012

Federal Court Approves NLRB's Employee Rights Poster

On March 2, 2012, U.S. District Judge Amy Berman Jackson of the United States District Court for the District of Columbia, ruled, in a forty-six page opinion, that the National Labor Relations Board's controversial "Employee Rights Under the National Labor Relations Act" poster is legal. Judge Jackson, whom President Obama appointed in 2011, found that in enacting the National Labor Relations Act, Congress did not preclude the NLRB "from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act."

This ruling means that all employers subject to the NLRB's jurisdiction – almost all private sector employers -- will have to post the poster effective April 30, 2012, regardless of whether their workforces are unionized or non-unionized, unless a contrary judicial ruling in another pending lawsuit challenging the notice-posting requirement causes the NLRB to delay the implementation of that requirement.

Content, Size, and Form of the Poster

Judge Jackson stated that the poster is "purely factual and uncontroversial" because it is "simply a statement of employee rights under the law."

The text of the poster states that employees have certain rights under the NLRA, including the right to:

- Organize a union to negotiate with their employers concerning their wages, hours, and other terms and conditions of employment;
- Form, join or assist a union;
- Bargain collectively through representatives of the employees' own choosing for a contract with their employer setting wages, benefits, hours, and other working conditions;
- Discuss employee wages and benefits and other terms and conditions of employment or union organizing with co-workers or a union;
- Take action with one or more co-workers to improve their working conditions by, among other means, raising work-related complaints directly with their employer or with a government agency, and seeking help from a union;
- Strike and picket, depending on the purpose or means of the strike or the picketing; or
- Choose not to do any of these activities, including joining or remaining a member of a union.

The poster also informs employees that it is illegal for an employer to take certain actions:

- Prohibit employees from talking about or soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms;

- Question employees about their union support or activities in a manner that discourages them from engaging in that activity;
- Fire, demote, or transfer, or reduce hours or change shift, or otherwise take adverse action against employees, or threaten to take any of these actions, because they join or support a union, or because they engage in concerted activity for mutual aid and protection, or because they choose not to engage in any such activity;
- Threaten to close the workplace if workers choose a union to represent them;
- Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support;
- Prohibit employee from wearing union hats, button, t-shirts, and pins in the workplace, except under special circumstances; or
- Spy on or videotape peaceful union activities and gatherings or pretend to do so.

The poster further states that “illegal conduct will not be permitted” and informs employees how to contact the NLRB “promptly to protect your rights” and to file “unfair labor practice” charges.

The poster must be at least 11 inches by 17 inches in size and in color or black and white. It can be downloaded from the NLRB’s website, www.nlrb.gov. Employers are required to post the notice “in conspicuous places where they are readily seen by employees, including all places where notices to employees concerning personnel rules or policies are customarily posted.” Also, employers that customarily communicate with their employees about personnel rules or policies on an intranet or internet site are required to post the notice on those sites or provide a link to the NLRB’s website posting. The notice must be posted in one or more other languages if 20 percent, or more, of the employer’s workforce is not proficient in English and speaks a language other than English.

Consequences of Failing to Post the Notice

While upholding the NLRB’s authority to require employers to post the employee rights notice, Judge Jackson, however, also ruled that the NLRB did not have the authority to impose certain penalties on employers for failing to post the notice. First, Judge Jackson concluded that the NLRB lacked the authority to promulgate a rule that “labels any failure to post the notice to be an unfair labor practice” under the NLRA. The NLRB “cannot make a blanket advance determination that a failure to post will always constitute an unfair labor practice.”

However, the NLRB can find, in “any individual case,” that a “failure to post constitutes an unfair labor practice” if the NLRB makes “a specific finding based on the facts and circumstances in the individual case...that the failure to post interfered with the employee’s exercise of his or her rights.” In a March 2nd statement in response to the court’s decision, NLRB Chairman Mark Pearce stated his appreciation for the court’s recognition that the NLRB “can find, on a case-by-case basis, that an employer’s failure to post the notice is an unfair labor practice.”

Second, the NLRB lacked the authority under the NLRA to “toll” or suspend the six-month statute of limitations “in any future unfair labor practice action involving a job site where the notice was not posted.”

Yet Judge Jackson further concluded that the lawsuit did not challenge the part of the NLRB’s regulation authorizing it to consider a failure to post the notice as evidence of an employer’s unlawful motive. In the absence of a specific challenge to that provision, it “remains valid.”

Conclusion

For employers, this judicial decision should end the uncertainty about whether and when to post the NLRB's employee rights notice. Effective April 30, 2012, employers will have to post the notice, absent a contrary ruling in the other lawsuit that results in a delay of the effective date. Although one of the plaintiffs in the case, the National Right to Work Legal Defense and Education Fund, has already stated that it will appeal Judge Jackson's decision, the filing of an appeal should not delay the April 30th effective date.

The NLRB's reason for educating non-unionized employees about their rights to unionize by requiring employers to post the notice is to increase the unionization rate among private sector employees. The employee rights poster is only one of the current pro-union NLRB's recent actions to facilitate unionization of non-unionized employees. In response, an employer that seeks to remain non-unionized should use this impending notice-posting requirement as an opportunity to review and update its plan for remaining non-unionized, to assess its vulnerability to union organizing activity, and to train its supervisors and managers about the NLRB's poster, why the employer wants to remain non-unionized, and how it plans to achieve that goal.

If you have any questions about the NLRB's notice posting rule or what it means to employers, please contact your Butzel Long attorney or the author of this Client Alert.

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