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Court Strikes Down Notice of Workers' Rights Rule

In a win for employers, a federal appellate court recently held that the National Labor Relations Board's ("NLRB") regulation requiring employers to post notices of worker rights under the National Labor Relations Act ("NLRA") was invalid. Specifically, on May 7, 2013, in *National Association of Manufacturers v. NLRB*, the D.C. Circuit Court held that the NLRB regulation violated employers' constitutional right to free speech. The challenged NLRB rule went into effect in April 2012, but was stayed pending resolution of its challenge. The D.C. Circuit Court is the first appellate court to address the validity of the NLRB regulation.

How did the NLRB rule impact employers? The challenged NLRB rule provided, among other things, that:

- all employers subject to the NLRA must post notices informing employees of their NLRA rights in the workplace (including on the employer's intranet or internet sites if regularly used by the employer to communicate with employees);
- any employer who failed to post the notice would be deemed to have committed an "unfair labor practice"; and
- the NLRB could suspend the running of the usual six-month limitations period for filing an unfair labor practice charge based on the employer's failure to comply with the notice requirement.

What did the D.C. Circuit Court Hold? In vacating the NLRB's rule in its entirety, the court found that the NLRB notice requirement – which forced employers to disseminate the notice to employees "upon pain of being held to have committed an unfair labor practice" – infringed upon the employer's right to free speech. Significantly, the court noted that free speech protects not only the right to disseminate speech, but also the right to decide *not to* disseminate it. Based on this same reasoning, the court held that the portion of the rule requiring the NLRB to treat an employer's failure to post the notice as an unfair labor practice also violated employers' right to free speech. In addition, the court held the NLRB's attempt to enforce a notice posting requirement by tolling the statute of limitations period in an unfair labor practice case was invalid because it was contrary to Congressional intent when Congress provided for a six-month limitations period in the statute.

What Are The Take-Aways for Employers? The decision alleviates the burden of having to comply with the NLRB's rule, but employers are well-advised to remain apprised of the similar litigation currently pending in the Fourth Circuit (*Chamber of Commerce of the U.S. v. NLRB*). Although a lower federal court in South Carolina held that the NLRB lacked authority to promulgate the posting

requirement rule, to the extent the Fourth Circuit reverses such decision (or otherwise holds contrary to that of the *National Manufacturers* decision), the “circuit split” would potentially need to be resolved by the Supreme Court.

Contact Information. For more information on this subject, please contact Douglas Towns (404.888.8852) or Emily Friedman (404.888.8871).

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