

NLRB Posting Rule Upheld

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On March 2, 2012, Judge Amy Berman Jackson of the United States District Court for the District of Columbia held that the National Labor Relations Board ("Board") lawfully promulgated Subpart A of its Rule, "Notification of Employee Rights under the National Labor Relations Act" which requires employers to post a notice of employee rights. However, the Board exceeded its authority under the NLRA by promulgating the two provisions under Subpart B of the Rule that permit the Board to deem failure to post an unfair labor practice and to toll the statute of limitations for claims against employers who fail to post the notice.

On December 27, 2011, we reported that in *National Association of Manufacturers, et al. v. National Labor Relations Board, et al.*, Civil Action No. 11-1629 (ABJ) (D.D.C.), the court was considering plaintiffs' legal challenges to the Rule under the Administrative Procedures Act ("APA") and the First Amendment to the United States Constitution. Regarding the argument that the Board had violated the APA, Judge Jackson found that the Board had not exceeded its authority under the NLRA and that its Rule was reasonable and neither arbitrary nor capricious. In addition, the Rule did not violate the First Amendment, because the required notice poster is clearly a communication from the Board. Therefore, it is compelled "government speech," which is not subject to free speech scrutiny.

However, Judge Jackson held that the remedial provision in the Rule stating that a failure to post a notice is an unfair labor practice was an invalid "blanket determination." Instead, the Board must consider the circumstances of each failure to post claim and

make specific findings before it can find an unfair labor practice. Judge Jackson reasoned that Congress had specifically defined unfair labor practices under the NLRA, which limit the Board had exceeded in its Rule. Similarly, Judge Jackson found that universal tolling of the statute of limitations for unfair labor practice claims against noncompliant employers was invalid. Again, the Board must make an individualized determination as to any tolling claim.

Judge Jackson specifically declined to make a determination as to whether President Obama's January 4, 2012 recess appointments of new NLRB members were void. She concluded that the Rule was promulgated by the proper quorum, a three-person board. Therefore, plaintiffs' challenge that the Board now only consists of two validly serving members did not persuade the court.

Based on Judge Jackson's ruling that the Board's notice posting requirement is valid, all employers should plan to comply on April 30, 2012. Although the ruling from Judge Jackson states that a failure to post a notice cannot be considered a per se unfair labor practice and that tolling of the statute of limitations must be made on a case-by-case basis, these remain possible remedies that the Board may impose against a violating employer. The Board will need to revise Subpart B of its Rule, but it is fully expected that Subpart A will be effective as of April 30, 2012.

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