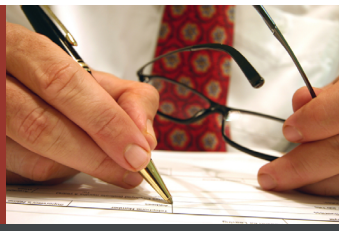
Labor & Employment Alert



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NLRB's Posting Rule Survives —For Now

By: Charles J. Mataya

Business groups took one on the chin recently when their challenge to the National Labor Relations Boards' ("NLRB") new posting rule was upheld by the opinion of a judge in the United States District Court in Washington, D.C. With that decision, it becomes a little more likely that employers will be required to follow the new posting requirement by April 30, 2012, the newest date set by the NLRB for the rule to take effect. 76 Fed. Reg. 82,133 (Dec. 30, 2011). Nonetheless, the fight against the posting requirement continues.

The notice, which is available for review and printing on the NLRB's website describes the National Labor Relations Act ("NLRA") and then states the following:

> **Under the NLRA, you have the right to:**
>
> - Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.
> - Form, join or assist a union.
> - Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.
> - Discuss your wages and benefits and other terms and conditions of employment or union organizing with your co-workers or a union.
> - Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your 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.
> - Choose not to do any of these activities, including joining or remaining a member of a union.

The notice concludes with the instruction: "If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity."

In the case, several business groups, including the National Association of Manufacturers and the National Right to Work Legal Defense and Education Foundation, brought suit seeking to enjoin enforcement of the new rule requiring those employers covered by the NLRA to post a notice to employees, in conspicuous places, informing them of their NLRA rights. The notice also provides NLRB contact information to employees, as well as information concerning basic enforcement procedures.

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Nonunion employers see this notice as too union-friendly, unnecessary, potentially disruptive, and completely counterproductive. As they see it, in a competitive business world where flexibility and creativity are necessary to survival, this new rule promotes neither. Instead, it promotes one of the things many businesses believe will negatively impact both: labor unions.

The groups made several arguments for striking down the rule. One of the primary arguments relied on the observation that Congress has not granted the NLRB explicit statutory authority to require the posting of notices, as it has with other federal agencies. In fact, over the course of its 76-year history, the NLRB has never before required the posting of a notice by employers who had neither committed an unfair labor practice nor been involved in a representation proceeding. As the argument goes, without an express grant of such power, the posting requirement is illegal.

The district court disagreed. It determined that the new rule was within the NLRB's rulemaking authority provided under the NLRA. While the statute did not expressly authorize such a rule, neither did the NLRA prohibit such a rule. Moreover, the NLRB is granted rulemaking authority, and the new posting rule, as the court saw it, is a reasonable exercise of that rulemaking authority.

In spite of this setback, the business groups are not ready to quit. The district court's decision came down on Friday, March 2, 2012. On Monday, March 5, 2012, the groups filed a Notice of Appeal, asking the D.C. Circuit Court of Appeals to overturn the decision. On that same day, the business groups requested the district court enjoin the posting requirement pending resolution of their appeal of its decision. The request was denied by the district court on Wednesday, March 7, 2012, partially based on its earlier determination that a portion of the rule—which makes failure to post the notice an unfair labor practice—was illegal, meaning the rule could not irreparably harm anyone. Presumably, the groups disagree.

Whether the groups' challenge will ultimately be successful is unclear. However, one thing is clear: The posting rule is not a positive development for employers. With these recent developments, it now seems much more likely that employers will end up having to post this notice.

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