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COURT UPHOLDS NLRB'S RIGHT TO REQUIRE EMPLOYERS TO POST NOTICE REGARDING UNIONS

On March 2, 2012, the U.S. District Court for the District of Columbia issued a decision in the case of *National Association of Manufacturers v. NLRB*, challenging the National Labor Relations Board's (NLRB's) controversial new posting rule regarding employees' union rights. In a disappointing decision for employers, the court upheld the NLRB's ability to require the workplace posting. The court did strike down two enforcement provisions that provided for an automatic finding of an unfair labor practice and automatic tolling of the limitations period in the face of a violation, but left the door open for case-by-case imposition of these remedies by the NLRB.

Factual Background

On August 30, 2011, the NLRB promulgated its Final Rule, "Notification of Employee Rights under the National Labor Relations Act." The new rule, found at 29 C.F.R. § 104.202, requires all employers covered by the National Labor Relations Act (NLRA) to post a notice informing employees of their rights to, among other things, form a union, join a union, assist a union, or refrain from doing any of these things. After several delays, the effective date of the new rule is currently April 30, 2012. More information on the details of the posting requirement can be found in a recent WSGR Alert available at http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgr_alert-right-to-unionize.htm.

Legal Challenge

Before the rule became effective, a number of business-friendly organizations, including the National Right to Work Legal Defense and

Education Foundation and the National Chamber of Commerce, filed lawsuits challenging the new rule. One such lawsuit, brought by the National Association of Manufacturers (NAM), alleged that the NLRB lacked the authority: (1) to promulgate and enforce the notice-posting rule under Section 6 of the NLRA; (2) to require employers to post a notice absent the filing of a charge or petition; (3) to deem the failure to post to be an unfair labor practice; and (4) to toll the statute of limitations for filing an unfair labor practice charge. The NAM also argued that the rule violates the First Amendment rights of employers.

Holding

The court upheld the NLRB's right to enact the posting requirement rule, noting that it "cannot find that in enacting the NLRA, Congress unambiguously intended to preclude the [NLRB] from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act." Moreover, the court held that the workplace notice does not violate employers' right to free speech.

The court did invalidate two key provisions of the rule relating to remedies for violations. The first invalidated provision provided that failure to post the notice automatically would be considered an unfair labor practice charge. The second invalidated provision tolled the applicable limitations period for filing a charge against an employer who failed to post the notice. The court held that these "blanket provisions" were improper. However, in both situations, it left open the possibility that these remedies may be available to the NLRB on a case-by-case basis.

Implication

While the holding did invalidate parts of the rule, the requirement that employers post the notice still stands. In addition, while overturning portions of the rule relating to automatic remedies for violations, the court made it clear that such remedies were still available to the NLRB on an individualized basis. Although additional suits have been filed challenging the rule and an appeal of the decision is likely, employers will be well served by preparing to comply with the rule by its current effective date of April 30, 2012.

For more information on the court's decision or any other related matter, please contact a member of Wilson Sonsini Goodrich & Rosati's employment law practice.



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