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NLRB Notice-Posting Requirement Indefinitely Postponed

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Just four days after the U.S. District Court for the District of South Carolina created a split of legal authority by striking down a National Labor Relations Board (NLRB) rule requiring most private employers to post a notice informing employees of their rights under the National Labor Relations Act (NLRA), the U.S. Court of Appeals for the District of Columbia Circuit granted an emergency motion for an injunction pending appeal in the underlying case, *National Association of Manufacturers v. NLRB*, No.11-1629. The D.C. Circuit Court's April 17, 2012, order indefinitely enjoins enforcement of the notice-posting rule pending resolution of an expedited appeal. As of April 17th, employers are **not** required to post the notice of employee rights by the original April 30, 2012, deadline.

Citing both Judge David C. Norton's April 13, 2012, decision striking down the notice-posing rule in the District of South Carolina, and Judge Amy Jackson's March 2, 2012, decision broadly upholding the rule in the District of Columbia, but severely limiting its enforcement mechanisms, the D.C. Circuit Court observed that "uncertainty about enforcement counsels further in favor of temporarily preserving the status quo while this court resolves all of the issues on the merits." The D.C. Circuit Court further noted that the NLRB's opposition to entry of an injunction was in "tension" with its earlier decisions to postpone the rule's operation while the district courts considered its legality.

While indefinitely enjoining enforcement of the notice-posting rule, the D.C. Circuit Court's order also sets the underlying case for expedited consideration. Oral arguments will be held in September 2012, and a decision will enter sometime thereafter. Until that occurs, and absent any contrary order from the U.S. Court of Appeals for the Fourth Circuit (which will almost certainly review Judge Norton's decision in the District of South Carolina case, *Chamber of Commerce v. NLRB*, No. 11-cv-2516), employers have no legal obligation to post the 11-by-17 inch posters advising employees of their rights under the NLRA. In fact, the Board issued a news release following entry of the injunction today acknowledging that it will direct regional offices not to implement the rule pending resolution of the issues before the D.C. Circuit Court.

The D.C. Circuit Court's order is a tremendous boon for employers. Business groups have stridently opposed the notice-posting requirement on the grounds that it violates employers' First Amendment rights, and

mandates the posting of an excessively pro-union message. The rule also purports to proactively regulate more than six million private employers who have otherwise engaged in no conduct subject to the Board's regulation. While the rule's legality is still undecided—and may ultimately require resolution by the U.S. Supreme Court—employers may now comfortably sit back and let courts resolve the thorny legal issues without risking an unfair labor practice charge by not posting the notice.

For more information about the NLRB's notice-posting rule, or other ongoing initiatives by the Board, please contact Brian M. Mumaugh or Bradford J. Williams of Holland & Hart's Labor & Employment Practice Group.

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