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The U.S. District Court for the District of South Carolina just became the second federal district court to weigh in on the legality of 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). In his April 13, 2012, decision, Judge David C. Norton held that the notice-posting rule exceeded the NLRB's authority in violation of administrative law. The decision leaves employers hanging regarding their obligations in advance of the April 30, 2012, notice-posting deadline.

In August 2011, the NLRB issued a final administrative rule requiring all private employers covered by the Act to post 11-by-17 inch posters "in conspicuous places" advising employees of their rights under the NLRA. These rights include the right to form, join, or assist unions; to negotiate with employers through unions; to bargain collectively through representatives of employees' own choosing; and to strike and picket. The rule was stridently opposed by business groups which felt that it violated employers' First Amendment rights, and mandated the posting of an excessively pro-union message. The final rule required employers who customarily communicate with employees regarding personnel matters using an intranet or internet site to post the notice prominently on that site.

To ensure compliance, the rule provided that failure to post the required notice would be deemed an unfair labor practice (ULP) under Section 8(a)(1) of the Act. The Board could automatically toll (or stay) the six-month statute of limitations for all ULP actions—not just those arising out of a failure to post—where employers failed to post the notice. In addition, the knowing and willful refusal to post the notice could be used "as evidence of unlawful motive" in ULP cases in which motivation was at issue.

In late 2011, the NLRB's final administrative rule was challenged in lawsuits filed in the U.S. District Court for the District of Columbia, and the U.S. District Court for the District of South Carolina. Due in part to this pending litigation, the rule's effective date was postponed to January 31, 2012, and then to April 30, 2012.

On March 2, 2012, Judge Amy Jackson of the U.S. District Court for the District of Columbia issued a ruling in the first of the two lawsuits, *National Association of Manufacturers v. NLRB*, No.11-1629 (ABJ) (D.D.C. Mar. 2,

2012). Judge Jackson broadly upheld the NLRB's right to issue the notice-posting rule, but struck down automatic sanctions for failure to post the required notice. She held that failure to post might constitute an ULP, and might toll the statute of limitations, but found that the Board would have to make specific findings in each ULP case to impose such sanctions. Judge Jackson's decision is currently on appeal to the U.S. Court of Appeals for the District of Columbia Circuit, and the appellate court has not yet ruled on a motion that would enjoin the rule's enforcement pending the court's decision.

Last Friday, Judge Norton stepped into this fray by issuing a diametrically opposed decision in the second of the two lawsuits, *Chamber of Commerce v. NLRB*, No. 11-cv-2516 (DCN) (D.S.C. Apr. 13, 2012). Judge Norton found that the Board had exceeded its authority under Section 6 of the Act by issuing the notice-posting rule. Noting that Section 6 gives the Board the power to make "such rules and regulations as may be necessary to carry out the provisions of the [NLRA]," the judge found that the notice-posting rule was not "necessary" to any of the Act's provisions. On the contrary, the NLRA empowers the Board to prevent and resolve ULP charges and to conduct representative elections. Judge Norton noted that these duties are inherently "reactive," and found that nothing in the Act requires employers to "proactively" post notices of employee rights. As Judge Norton concluded: "Neither Section 6 nor any other section of the NLRA even mentions the issue of notice posting."

Judge Norton further rejected the argument that the Board had acted appropriately by filling a statutory "gap" in the NLRA. He observed that Congress had inserted at least eight explicit notice requirements into federal labor statutes since 1934, while the NLRA had "remained silent." He concluded that Congress "clearly knows how to include a notice-posting requirement in a federal labor statute when it so desires," but found that there is "not a single trace of statutory text that indicates Congress intended for the Board to proactively regulate employers in this manner."

Interestingly, Judge Norton did not discredit the Board's factual finding that there is an increased need for employees to learn of their NLRA rights, and he did not dispute Judge Jackson's conclusion that the Board had articulated a rational connection between this finding, and the Board's decision to promulgate the notice-posting rule. Nonetheless, he implicitly found that any such connection was irrelevant in light of the plain language and structure of the Act, which he said compelled his conclusion that the Board lacked the authority to promulgate the rule.

Judge Norton's decision is extremely favorable for employers, but is it unfortunately only likely controlling in the District of South Carolina. Conversely, Judge Jackson's decision is broadly disappointing for employers, but is only likely controlling in the District of Columbia. Courts in other jurisdictions—including in the Tenth Circuit—have yet to weigh in on the issue. If Judge Norton's decision is eventually appealed (as is likely), and the U.S. Court of Appeals for the Fourth Circuit reaches a different decision than the U.S. Court of Appeals for the District of Columbia, the notice-posting issue could end up before the U.S. Supreme

Court.

A spokesman for the NLRB announced last Friday that the Board was studying Judge Norton's decision, and would be deciding on an appropriate course of action. As it has done before, the Board might postpone enforcement of the rule pending further court action. Alternatively, the Board might take the position that the rule is only unenforceable in the District of South Carolina, but is enforceable elsewhere. The U.S. District Court for the District of South Carolina, or the U.S. Court of Appeals for the District of Columbia Circuit (or even the U.S. Court of Appeals for the Fourth Circuit, if Judge Norton's ruling is appealed), could separately enjoin enforcement of the rule given the current split in legal opinion.

In the wake of Judge Norton's decision, employers are advised to monitor further developments in both the District of South Carolina case, and in the District of Columbia case. Employers may also want to monitor the NLRB's website. As the April 30th notice-posting deadline approaches, employers may wish to consult with legal counsel about the potential costs of posting an arguably pro-union poster, and the likelihood that the notice-posting rule may eventually be invalidated in their jurisdiction. For more information or advice on compliance, please contact Brian M. Mumaugh or Bradford J. Williams of Holland & Hart's Labor & Employment Practice Group.
