

Court Upholds NLRB Notice-Posting Requirement, Strikes Down Automatic Sanctions for Failure to Post

Court Upholds NLRB Notice-Posting Requirement, Strikes Down Automatic Sanctions for Failure to Post

Insight — March 6, 2012

The U.S. District Court for the District of Columbia issued a highly anticipated ruling last Friday, broadly upholding the National Labor Relations Board's (NLRB's) right to issue a rule requiring most private employers to notify employees of their rights under the National Labor Relations Act (NLRA) by posting a notice. The ruling struck down automatic sanctions for failure to post the required notice, but did not altogether eliminate the possibility that failure to post might constitute an unfair labor practice (ULP) under the NLRA. Absent further Board postponement in light of a likely appeal, or a contrary ruling from a second district court still considering the matter, the notice-posting requirement will go into effect on April 30, 2012.

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. Employers who customarily communicate with employees regarding personnel matters using an intranet or internet site were further required to post the notice prominently on that site. As originally written, the rule provided that failure to post would be deemed an ULP under Section 8(a)(1) of the Act. It further permitted the Board to 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 had failed to post the required notice.

In late 2011, the NLRB's final 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 original November 14, 2011, effective date was initially postponed to January 31, 2012, and then postponed again to April 30, 2012.

Last Friday, Judge Amy Jackson of the U.S. District Court for the District of Columbia issued her ruling in one of the two lawsuits, *National Association of Manufacturers v. NLRB*, No.11-1629 (ABJ) (D.D.C. March 2, 2012). The judge rejected the plaintiffs' contention that the NLRB had exceeded its authority in promulgating the notice-posting requirement. Finding that Congress had not "unambiguously intended to preclude the Board from promulgating a rule that requires employers to post a notice informing employees of their rights under the Act," she upheld the notice-posting

requirement as a valid exercise of the Board's authority under the deferential standard of review applicable to administrative rulemaking.

Despite upholding the notice-posting requirement, Judge Jackson found that the NLRB had also exceeded its authority in automatically deeming all failures to post to be ULPs under the Act. Because Section 8(a)(1) only prohibited employers from "interfer[ing]" with rights guaranteed by the Act, it only prohibited employers from "getting in the way - from doing something that impedes or hampers an employee's exercise of the rights guaranteed by [Section 7] of the statute." The automatic sanction of an ULP for any employer who failed to post would not distinguish between situations in which an employer's failure was intended to or did exert influence over employees' organizational efforts, and those in which an employer merely declined or failed to post the required notice. As such, the judge found that the automatic sanction of an ULP was inconsistent with the Act's plain meaning.

Critically, Judge Jackson noted that her decision did not "prevent[] the Board from finding that a failure to post constitutes an unfair labor practice in any individual case brought before it." As such, the Board may still determine that any particular failure to post constitutes an ULP, at least assuming it makes specific findings that the failure actually interfered with an employee's exercise of his or her rights.

For similar reasons, Judge Jackson struck down the rule's provision permitting the Board to automatically stay the statute of limitations in any ULP action where the employer had failed to post the required notice. The judge found that the Act provided an unambiguous six-month statute of limitations, and that the rule effectively supplanted this limitations period for a broad class of employers regardless of particular circumstances. Again, she nonetheless observed that, under a well-established common law doctrine, her decision did not "prevent the Board from considering an employer's failure to post the employee rights notice in evaluating a plaintiff's equitable tolling defense in an individual case before it."

Judge Jackson's March 2nd ruling is, for the most part, disappointing for employers. It upholds the notice-posting requirement that will go into effect on April 30th absent further Board postponement, or a contrary ruling in the second pending lawsuit, *Chamber of Commerce v. NLRB*, D.S.C., No. 11-cv-2516. It further permits the NLRB to find individual failures to post to be ULPs under the Act, at least given appropriate factual findings. Finally, the judge's statute of limitations ruling may expose employers to stale ULP charges where employees succeed in showing that they were unaware of their rights under the NLRA due to an employer's failure to post.

The plaintiffs in *National Association of Manufacturers* have already vowed to appeal Judge Jackson's ruling. Pending any eventual reversal by the U.S. Court of Appeals for the District of Columbia Circuit, or any contrary ruling by the U.S. District Court for the District of South Carolina, employers are now presumptively required to comply with the rule's notice-posting requirement by April 30th. Employers will consequently need to weigh the possible costs of posting an arguably pro-union poster against the likelihood that Judge Jackson's ruling may eventually be reversed, and

additionally consider that failure to post the notice could - but will no longer automatically - result in an ULP or other adverse sanction. For more information or advice on compliance, please contact Bradford J. Williams of Holland & Hart's Labor & Employment Practice Group at (303) 295-8121 or bjwilliams@hollandhart.com.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.